TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 111

DECEMBER TERM, 1868.

SAMUEL AND LOUIS FASNACHT, PLAINTIFFS IN ERROR,

vs.

DEBORAH WESTERFIELD, WIFE OF CORNELIUS WESTERFIELD, AND PETER A. H. JACKSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED NOVEMBER 30, 1868.

SUPREME COURT OF THE UNITED STATES.

No. 310.

DECEMBER TERM, 1868.

SAMUEL AND LOUIS FASNACHT, PLAINTIFFS IN ERROR,

VS.

DEBORAH WESTERFIELD, WIFE OF CORNELIUS WESTERFIELD, AND PETER A. H. JACKSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

INDEX.

	Original.	Print.
Petition, filed January 7th, 1868	1	1
Note "F"	6	2
"H"	7	3
Notarial act "M"	8	3
Citation to Samuel Fasnacht	22	7
Marshal's return	24	8
Citation to Louis Fasnacht	24	8
Marshal's return	26	8
Pleas to the jurisdiction and lis pendens	26	9
Affidavit	28	9
Record No. 11058, Sixth District Court of New Orleans, case Thos. H. Murphy *vs.* S. and L. Fasnacht	29	10
Petition, filed February 9th, 1864	29	10
Order	34	11
Note	34	11

	Original.	Print.
Note	36	12
Act of mortgage	37	12
Writ of seizure	51	17
Sheriff's notice	54	17
return on notice	55	18
notice of seizure	56	18
return on notice	58	19
return on writ	59	19
Petition of appeal	60	19
Order and bond	61	20
Citation of appeal	63	21
Sheriff's return on citation	64	21
Rule to dismiss appeal	65	21
Sheriff's return on rule	65	21
Evidence on trial of rule	66	21
Hearing and dismissing rule	67	22
Decree of Supreme Court	68	22
Clerk's certificate	69	23
Judge's certificate	70	23
Clerk's certificate	71	23
Record No. 19649, case Thos. H. Murphy *vs.* S. and L. Fasnacht, Sixth District Court of New Orleans	72	23
Petition, filed February 18, 1867	73	24
Note	76	25
Note	77	25
Act of mortgage	79	26
Citation to Louis Fasnacht	93	30
Sheriff's return	94	30
Citation to Samuel Fasnacht	95	31
Sheriff's return	96	31
Plea to jurisdiction	96	31
Order fixing exception	97	31
Notice of trial	98	32
Sheriff's return	98	32
Exception dismissed	99	32
Rule	99	32
Exception and answer	100	33
Sheriff's return	102	33
Order continuing rule and fixing exception	103	34
Exception to rule continued	104	34
Order continuing rule	104	34
Order continuing rule	104	34
Note of evidence	104	34
Hearing and dismissal	105	34
Order of exception as to citation	106	35
Plea of prescription	106	35
Testimony	107	35
Bill of exception	108	36
Bill of exception	109	36
Judgment	113	37
Rule for new trial	114	37

	Original.	Print.
Affidavit	116	38
Return on rule	118	39
Hearing and continuing	118	39
Hearing and submitted	119	39
Opinion of court	120	40
Order for new trial	121	40
of discontinuance	121	40
Clerk's certificate	122	40
Judge's certificate	123	41
Clerk's certificate	124	41
PROCEEDINGS IN UNITED STATES CIRCUIT COURT.		
Order, pleas fixed for trial	125	41
Notice of trial	125	42
Marshal's return	126	42
Note of evidence	127	42
Judgment by default	128	43
Default set aside	128	43
Answer	129	43
Affidavit for commission	131	44
Additional affidavit for commission	132	44
Order for commission	132	44
Interrogatories for plaintiff	133	45
Notice to cross-interrogatories	135	45
Marshal's return	135	46
Cross-interrogatories	136	46
Commission for plaintiff	137	46
Interrogatories-in-chief annexed to commission	139	47
Cross-interrogatories annexed to commission	141	48
Note marked "F" and note "H," annexed to interrogatories	143	48
TESTIMONY TAKEN UNDER COMMISSION.		
Deposition of Mrs. Westerfield	143	49
Letters Nos. 1 to 14 inclusively, annexed to foregoing deposition	149 to 176	59
Deposition of Peter A. H. Jackson	176	59
Notice to take testimony	184	61
Marshal's return	185	61
Testimony on behalf of plaintiff	185	62
of Thos. H. Murphy	186	62
Note of evidence	193	64
Judgment	194	64
Rule for a new trial	196	65
Rule and grounds	196	65
Marshal's return	199	66
Hearing, rule submitted	199	66
Order, rule discharged	200	67
Final judgment	200	67
Petition for writ of error	202	67
Order allowing writ of error	203	68
Bond for writ of error	204	68

	Original.	Print.
Defendants' bill of exception	208	69
Defendants' bill of exception	209	70
Clerk's certificate	211	71
Writ of error	212	71
Citation in error to Peter A. H. Jackson, and service	213	71
Citation in error to Deborah A. Westerfield, and service	214	72

1 Circuit Court of the United States, fifth circuit and district of Louisiana.

Petition.—Filed January 7th, 1868.

PETER A. H. JACKSON *et als.*
vs.
SAMUEL AND LOUIS FASNACHT. } No. 5401.

To the honorable judges U. S. Circuit Court, fifth circuit and district of Louisiana:

The petition of Deborah A. Westerfield, wife of Cornelius Westerfield, and herein duly authorized, and Peter A. H. Jackson, all of whom reside in New York city, respectfully represents:

That Samuel Fasnacht and Louis Fasnacht, who are both citizens of the State of Louisiana claiming a residence in the parish of Plaquemines, in this State, are justly and truly indebted unto your pe-
2 titioners in the full sum of two thousand eight hundred and thirty-three and 33⅓-100 dollars, with interest at seven per cent. per annum, from the 17th day of March, 1860, to the 17th March, 1862, and thereafter at the rate of eight per cent. per annum, together with three and 50-100 dollars costs of copy of notarial act, and costs of suit for this, to wit:

That petitioners are holders and owners of two certain promissory notes, one for two thousand dollars and the other for eight hundred and thirty-three 33⅓ dollars, both drawn by Samuel and Louis Fasnacht to their own order, and by them endorsed, both dated New Orleans, March 17th, 1860, and both payable two years after date, with interest at the rate of seven per cent. per annumn from date until maturity, and at eight per cent. per annum from maturity until final payment, and both payable ne varietur, New Orleans,
3 April 2nd, 1860, by J. E. Jarreau, notary public; all which will more fully appear by reference to the said promissory notes, which are hereunto annexed and made part hereof and marked T and H. Petitioners further show that by public act passed before J. E. Jarreau, then a notary of this city, on the 2nd day of April, 1860, in order to secure the payment of the aforesaid notes and others set forth in said act to any holder thereof, the said Samuel and Louis Fasnacht did specially mortgage and hypothecate in favor of any holder or holders of said notes as aforesaid, six certain lots of ground, with the buildings and improvements thereon, situate in the first district of this city, in the square bounded by Anunciation, Poeyfarre, Duplantier and Foucher streets, designated by the numbers one, two, three, four, five and fourteen, on a plan drawn by C. A. Hedin, on the 18th March, 1852, and deposited in the
4 office of H. B. Cenas, notary public, for reference, which said act of mortgage imports a confession of judgment in favor of any holder or holders of said notes, all of which will more fully ap-

pear by reference to an authentic copy of said notarial act, hereto annexed and made part hereof and marked "M."

Petitioners allege amicable demand and refusal to pay. They further represent that on 9th February, 1864, they instituted proceedings against said defendants in the name of their agent, Thomas H. Murphy, by executory process in the Sixth District Court of New Orleans, under the number 11058; and that defendants appealed from the order allowing the same, and on said appeal the order of the lower court was reversed.

That thereupon petitioners did as aforesaid enter suit before the same court via ordinaria by petition and citation, and that since the institution thereof said defendants have plead their domicil to be in the parish of Plaquemines, which petitioners are unable to disprove, and they now appear before this honorable court under the acts of Congress granting them the right, in order that they may have enforced the contract and obligation of defendants, and that justice may done to them.

Wherefore they pray that said Samuel Fasnacht and Louis Fasnacht be cited to answer this petition, and after due proceedings petitioners have judgment against them in the aforesaid sum of $2,833 33⅓, with interest thereon, at seven per cent. per annum, from 17th March, 1860, till 17th March, 1862, and at eight per cent. per annum thereafter till paid, $3 50-100, copy of act and costs of suit, with vendor's lien and special mortgage on the property described in the act of mortgage passed before J. E. Jarreau, notary, on 2nd of April, 1860; and petitioners pray that right and justice may be administered in the premises and for general relief.

(Signed) HORNOR & BENEDICT,
Attorneys for Petitioners.

Promissory note marked T, annexed to and filed with petition.

$2,000 00. NEW ORLEANS, *March 17th*, 1860.

Two years after date we promise to pay to the order of ourselves, the sum of two thousand dollars for value received at the Union Bank of Louisiana, in this city, with interest from date at the rate of seven per cent. per annum till maturity, and if not then punctually paid to bear interest at the rate of eight per cent. per annum from maturity until final payment.

(Signed) S'L FASNACHT.
(Signed) L'S FASNACHT.

Ne varietur. New Orleans, April 2d, 1860.
(Signed) J. E. JARREAU, *N. P.*

Endorsed: Pay to the order of Deborah Westerfield and Peter A. H. Jackson.

(Signed) S'L FASNACHT.
(Signed) L'S FASNACHT.

Promissory note marked H, annexed to and filed with petition.

$833 33⅓. NEW ORLEANS, *March 17th.* 1860.

Two years after date I promise to pay to the order of myself, the sum eight hundred thirty-thee 33⅓-100 dollars, for value received, at the Union Bank of Louisiana, in this city, with interest from date at the rate of seven per cent. per annum till maturity, and if not then punctually paid to bear interest at the rate of eight per cent. per annum from maturity until final payment.

(Signed) S'L FASNACHT.
(Signed) L'S FASNACHT.

Ne varietur. New Orleans, April 2d, 1860.
(Signed) J. E. JARREAU, *N. P.*

8 Endorsed: Pay to the order of Deborah Westerfield and Peter A. H. Jackson.

(Signed) S'L FASNACHT.
(Signed) L'S FASNACHT.

Notarial act, marked M, annexed to and filed with petition 2d April, 1860.—Sale of property.

MRS. C. WESTERFIELD, *et als.* to S. & L. FASNACHT.

STATE OF LOUISIANA, *City of New Orleans*:

Be it known that on this second day of the month of April, in the year of our Lord one thousand eight hundred and sixty, before me, J. Emile Jarreau, a notary public in and for the parish and city of New Orleans, duly commissioned and sworn and in the presence of the subscribing witness, personally came and appeared the
9 following named persons, to wit:

1o. Mrs. Mary P. Murphy, wife of Thomas H. Murphy, of this city, by her said husband duly authorized, herein acting in her own right.

2o. Mrs. Deborah Westerfield, wife of Cornelius Westerfield, by her said husband duly authorized, residing in the city of New York, herein acting in her own right, and as agent and attorney in fact of the following-named persons, by virtue of eleven powers of attorney, fully described in and annexed to an act of even date herewith, passed in this office, being a conveyance from the present vendors to N. Pepin, to wit:

3d. Mrs. Jane Ross, wife of William S. Ross, duly authorized by her said husband, residing in Williamsburgh, in the city of Brooklynn, State of New York.

4th. Catharine L. Ross, wife of John L. Ross, duly authorized by her said husband, and residing in Williamsburgh, in the city
10 of Brooklynn, State of New York.

5th. Mrs. Widow Eliza Jane Bertholf, residing in the city of New York.

6th. Peter J Bertine, residing in the city of New York.

7th. Simeon B. Johnson, of Yorktown, in the county of Westchester, State of New York.

8th. Mrs. Juliet Carman, wife of Lewis Carman, by her husband duly authorized, residing in the county of Jackson, State of Iowa.

9th. Mrs. Elisa J. Matson, wife of Silvestre G. Matson, duly authorized by her said husband, residing in Aminosa, in the county of Jones, State of Iowa.

10th. Mrs. Susan A. Carpenter, wife of Samuel Carpenter, by him duly authorized, residing in Angelica, in the county of Alleghanny, State of New York.

11th. Mrs. Amelia M. Pomroy, wife of Chester W. Pomroy,
11 by her said husband duly authorized, residing in St. Louis, State of Missouri.

12th. Mrs. Harriet Shunts, wife of Jacob Shunts, duly authorized by her husband, residing at Boun's Brook, in the State of New Jersey.

13th. Mrs. Henry J. Smith, residing in Kingston, in the county of Ulster, State of New York.

All the said parties before named being heirs-at-law of Mrs. Widow Elizabeth McCarter, who died in New York on the 16th of March, 1859, and whose last will and testament, and three codicils thereto, have been duly admitted to probate in the Second District Court of New Orleans, in order that the same may be executed, and being recognized as the only heirs of the said Mrs. McCarter by the said court, and having been put in possession of the real estate of which the said Mrs. McCarter died seized in the city of New Orleans,
12 as it will appear by reference to the certified copies of the orders of said Second District Court of New Orleans, annexed to an act of even date herewith in my office above referred to, the said Mrs. Mary P. Murphy and the said Mrs. Deborah Westerfield herein acting as aforesaid in their own right, and the latter acting as agent and attorney in fact of the afore-named parties, severally declared that for the consideration, and on the terms and conditions hereinafter expressed, and in conformation of the sale and adjudication made on the seventeenth day of March, instant, at the St. Charles Exchange, by J. B. Walton, a duly-licensed auctioneer of this city, whose process verbal is annexed for reference to an act of even date herewith in my office and already referred to.

They do by these presents grant, bargain, sell, convey, transfer, assign, set over and deliver, with all legal warranty, unto
13 Messieurs Louis Fasnacht and Samuel Fasnacht, both of this city, present, accepting and purchasing for themselves, their heirs and assigns, and acknowledging due delivery and possession thereof, the following-described property, to wit:

"Six certain lots of ground, together with all the buildings and improvements thereon, rights, privileges, customs, ways, servitudes and appurtenances thereunto belonging or in anywise appertaining,

situate in the first district of this city, (formerly municipality,) No. 'Two,' in the square bounded by Anunciation, Poeyfarre, Duplantier and Foucher streets, designated by the numbers 'one,' 'two,' 'three,' 'four,' 'five' and 'fourteen,' on a plan drawn by C. A. Hedin, civil engineer, on the eighteenth day of March, 1852, and deposited in the office of H. B. Cenas, notary public, for reference, which said lots measure as follows, towit: Lots numbers 'one' and 'two,' each thirty-two feet eight inches front on Annunciation street, by one hundred and twenty-nine feet five inches in depth between parallel lines, the said lot number one forming the corner of Annunciation and Poeyfarre streets; lots numbers 'three' and 'four,' each twenty-five feet front on Annunciation street, by one hundred and twenty-nine feet five inches in depth between parallel lines; lot number 'five,' twenty-five feet front on Annunciation street, twenty-five feet in width in the rear, on an alley nine feet seven inches wide, opening on Duplantier street, common to the said lots and others bordering thereon; and lot number 'fourteen,' measures twenty-five feet front on Poeyfarre street by one hundred and twenty-seven feet four inches in depth, between parallel lines, opening in the rear on the alley above referred to, all in conformity with the plan above mentioned;" which said lots of ground were acquired by the said Mrs. McCarter from the succession of Cornelius Paulding, by an act passed in the office of H. B. Cenas, notary public, on the 6th of May, 1852.

To have and to hold the said six lots of ground unto the said purchasers, their heirs and assigns, to their proper use and behoof forever. And the said vendors for themselves and their heirs, the said six lots of ground to the said purchasers, their heirs and assigns, shall and will warrant and forever defend against the lawful claims of all persons whomsoever by these presents; and the said vendors do moreover subrogate the said purchasers to all the rights and actions of warranty which they have or may have against their own vendor, or against the vendor of their vendors, fully authorizing the said purchasers to exercise the said rights and actions in the same manner as they could or might have done.

This sale is made and accepted for and in consideration of the total price and sum of twenty thousand five hundred dollars, price for which said property was adjudicated to the said purchasers, in part payment and deduction of which said purchasers have paid in cash the sum of six thousand eight hundred thirty-three dollars and thirty-three and one-third cents to the said vendors, who hereby acknowledge the receipt thereof and grant full discharge and acquittance for the same, and for the remainder of said price, say the sum of thirteen thousand six hundred and sixty-six dollars sixty-six and two-third cents, the said purchasers, in conformity with the terms and conditions of the said adjudication, have furnished the following eight promissory notes, dated on the seventeenth of March, instant, day of said adjudication, drawn by themselves to their own order, and by them endorsed, bearing seven per cent. per annum interest from date until maturity, and eight per cent. per annum interest thereafter until final payment, to wit:

Three notes for the sum of two thousand dollars each, and one note for the sum of eight hundred and thirty-three dollars thirty-three and one-third cents, payable one year after date; and three notes for the sum of two thousand dollars each, and one note for the sum of eight hundred and thirty-three dollars thirty-three cents, payable two years after date, and at the Union Bank of Louisiana, in this city, which said eight notes were marked "Ne varietur," and countersigned by me, notary, for the purpose of identification herewith, and were delivered to the said vendors, who hereby acknowledge the receipt thereof: Now, therefore, in order to secure the full and punctual payment of said notes in principal and interest, with all eventual interest, costs, charges and expenses, as the case may be, the said purchasers do, by these presents, mortgage and specially hypothecate the above described and conveyed six lots of ground in favor of their vendors and in favor of any future holders of said notes, binding themselves not to sell, mortgage, nor in any manner alienate said property, to the prejudice of this mortgage, and hereby confessing judgment for the amount of his said notes herewith identified, in principal, interest and costs.

In order more effectually to secure the full and punctual payment of said notes, in principal and interest, it is hereby agreed and understood that the said purchasers shall cause the buildings on the above-described six lots of ground to be insured against fire, in one of the insurance offices of this city, during the continuance of this mortgage, and shall transfer the policy of insurance to the said vendors or to any future holders of said note; which insurance shall continue to be renewed from time to time until the final payment of these notes herewith identified; and in default of the said purchasers causing the said insurance to be effected, it shall be lawful for the said vendors, or any future holders of said notes, to have the said buildings insured, and the premium and other expenses incurred for obtaining said insurance, or for renewing the same, shall be charged to the said purchasers, and the same shall be recovered under and by virtue of the clauses and stipulations of this act, which are made and intended expressly to secure all costs incurred for the recovery of said notes.

By reference to the mortgage certificate from the recorder of mortgages in and for this parish, of even date herewith and annexed to an act passed this day in my office, it will appear that there is no mortgage whatever recorded in the name of Mrs. McCarter against the property herein described and conveyed.

All the State and city taxes on the said property have been paid up to January, 1860, and as per receipt exibited to me, the undersigned notary; and the present purchasers bind themselves to pay the taxes for the year 1860 when the same shall be presented for collection.

Thus done and passed in my office, at the city of New Orleans, on this second day of April, eighteen hundred and sixty, in

21 the presence of Adolphe Mazureau and J. Ursin Jarreau, competent witnesses, who have hereunto signed their names with said parties and me, notary, after reading the whole.

D. A. WESTERFIELD.
MARY PATTON MURPHY.
T. H. MURPHY.
C. WESTERFIELD.
S. FASNACHT.
L. FASNACHT.

A. MAZUREAU.
J. U. JARREAU.

J. E. JARREAU, *N. P.*

The foregoing is a true copy of the original act extant in the office of J. Emile Jarreau, late notary public, whose registers are in my possession and custody as his successor in office.

New Orleans, November 14th, 1863.

(Signed) FELIX McCULLOCH,
[SEAL.] *Notary Public.*

OFFICE OF MORTGAGES.

I, the undersigned recorder of mortgages for the parish of
22 Orleans, city of New Orleans, State of Louisiana, certifies that the within deed was recorded in his office, in M, B. 75, fo. 159, under date of the 9th of April, 1860.

New Orleans, February the thirteenth, 1864.

[SEAL.] (Signed) G. W. MADDEN, *D'y Rec.*

Citation to Sam'l Fasnacht.

PETER A. H. JACKSON *et als.*
vs.
SAMUEL & LOUIS FASNACHT. } No. 5401.

The President of the United States of America to the marshal of the district of Lousiana, greeting:

You are hereby commanded to summon Samuel Fasnacht, a citizen of the State of Louisiana, to comply with the demand of Peter A. H. Jackson *et als.*, citizens of the State of New York, contained in the petition of which a copy accompanies this citation, or de-
23 liver his answer to the same in the office of the clerk of the Circuit Court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after the service hereof, or judgment will be rendered against him by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held; and that you make due return hereof on the first Monday of February, 1868.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of New

Orleans, this 7th day of January, A. D. one thousand eight hundred and sixty-eight, and of the independence of the United States of America the 92d year.

[SEAL.] (Signed) D. URBAN, *Clerk*,
By F. B. VINOT, *D'y Clerk.*

24 *Marshal's return.*

Received January 9th, 1868, and on same day of same month and year served a copy of the within citation, plaintiff's petition accompanying same, on Samuel Fasnacht, defendant named herein, personally, at his domicil, on Orange Grove plantation, about fifteen miles below city of New Orleans, in parish of Plaquemine, State of Louisiana.

New Orleans, January 10th, 1868.

(Signed) A. H. FREEMAN,
Spec'l Dep'ty U. S. Mar'l.

Citation to Louis Fasnacht.

PETER A. H. JACKSON *et als.*
vs.
SAMUEL & LOUIS FASNACHT. } No. 5401.

The President of the United States of America to the marshal of the district of Louisiana, greeting:

You are hereby commanded to summon Louis Fasnacht, a
25 citizen of the State of Louisiana, to comply with the demand of Peter A. H. Jackson *et als.*, citizens of the State of New York, contained in the petition of which a copy accompanies this citation, or to deliver his answer to the same, in the office of the clerk of the Circuit Court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after the service hereof, or judgment will be rendered against him by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held; and that you make due return hereof on the first Monday of February, 1868.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 7th day of January, A. D. one thousand eight
26 hundred and sixty-eight, and of the independence of the United States of America the 92d year.

[SEAL] (Signed) D. URBAN, *Clerk*,
By F. B. VINOT, *D'p'ty Clerk.*

Marshal's return.

Received January 9th, 1868, and on same day, same month and year, served a copy of the within citation, plaintiff's petition accompanying same, on Louis Fasnacht, defendant named herein, person-

ally at his domicil on the Orange Grove plantation, about fifteen miles below New Orleans, in parish of Plaquemine and State of Louisiana.

New Orleans, January 10th, 1868.

(Signed) A. H. FREEMAN,
Sp'l D'y'ty U. S. Marshal.

U. S. Circuit Court.

Pleas to the jurisdiction and lis pendens.—Filed January 21st, 1868.

PETER A. JACKSON *et als.*
vs.
SAMUEL & LOUIS FASNACHT. } No. 5401.

27 The defendants in this suit come into court by their undersigned attorney and except to plaintiff's petition, and say they are not bound to answer the same.

First. Because this honorable court has not jurisdiction over the parties in this suit, because they aver that the actual owner of the notes sued on and annexed to plaintiff's petition is one Thomas H. Murphy, a resident of New Orleans, and a citizen of the State of Louisiana, who has a suit now pending on the same notes in the Sixth District Court of New Orleans.

2d. These respondents plead lis pendens in the Sixth District Court of New Orleans, on the identical notes on which this suit is brought as a valid exception to the proceedings in this suit, and aver that Thomas H. Murphy, who in said suit asserts himself

28 to be the holder and owner of said notes, is not the same person as plaintiff who sue in this court, and hence this suit should be dismissed.

Wherefore, relying on the foregoing exceptions, these respondents reserving to themselves the right of answering over should their exceptions be overruled, pray that the petition of plaintiffs be dismissed, and that they be dispensed with answering the same.

(Signed) G. SCHMIDT, *Attorney.*

Affidavit.

G. Schmidt, attorney of defendants, declares on oath that to the best of his knowledge and belief the facts set forth in the foregoing exceptions are true.

(Signed) G. SCHMIDT.

Sworn to and subscribed January 21st, 1868, before me.

(Signed) F. B. VINOT, *D'y Cl'k.*

29 Transcript of record in case No. 11058, Sixth District Court of New Orleans, filed for plaintiff February 21st, 1868, offered in evidence by defendants February 28th, 1868, and by plaintiffs May 18th, 1868.

Sixth District Court of New Orleans, State of Louisiana.

Petition.—Filed February 9th, 1864.

THOMAS H. MURPHY
vs.
S. & L. FASNACHT. } No. 11058.

To the Honorable the Judge of the Sixth District Court of New Orleans:

The petition of Thomas H. Murphy, who resides in New Orleans, respectively shows, that Samuel Fasnacht and Louis Fasnacht, who who also reside in this city, are justly and truly indebted in solido unto your petitioner in the full sum of two thousand eight hundred and thirty-three 33⅓-100 dollars, with interest at
30 seven per cent. per annum, from the 17th day of March, 1862, and thereafter, at the rate of eight per cent. per annum, together with three 50-100 dollars, costs of copy of notarial act, and certificate for this, to wit:

That petitioner is holder and owner of two certain promissory notes, one for two thousand dollars, and the other for eight hundred and thirty-three 33⅓-100 dollars, both drawn by said Samuel and Louis Fasnacht to their own order and by them endorsed, payable two years after date, (both dated New Orleans, March 17th, 1860,) with interest at the rate of seven per cent. per annum, from date until maturity, and at eight per cent. per annum from maturity until final payment, and both paraphed ne varietur, New Orleans, April 2d, 1860, by J. E. Jarreau, notary public, all which will more
31 fully appear by reference to the said promissory notes, which are hereunto annexed and made part hereof, and marked T and H.

Petitioner further shows that by public act passed before J. E. Jarreau, then a notary of this city, on the 2d day of April, 1860, in order to secure the payment of the aforesaid notes and others set forth in said act to any holder thereof, said Samuel and Louis Fasnacht did specially mortgage and hypothecate in favor of any holder or holders as aforesaid six certain lots of ground, together with all the buildings and improvements thereon, rights, privileges, customs, ways, servitudes and appurtenances thereunto belonging or in any way appertaining, situate in the first district of this city, (formerly municipality No. two,) in the square bounded by Anunciation, Poeyfarre, Duplantier and Foucher streets, designated by the numbers one, two, three, four, five and fourteen, on a plan drawn by C. A. He-
32 din, civil engineer, on the eighteenth day of March, 1852,

and deposited in the office of H. B. Cenas, notary public, for reference, which said lots measure as follows:

Lots numbers one and two, each thirty-two feet eight inches front on Anunciation street, by one hundred and twenty-nine feet five inches in depth, between parallel lines, the said lot number one forming the corner of Anunciation and Poeyfarre streets; lots numbers three and four, each twenty-five feet front, on Anunciation street, by one hundred and twenty-nine feet five inches in depth, between parallel lines.

Lot number five, twenty-five feet front on Anunciation street, twenty-five feet in width in the rear on an alley nine feet seven inches wide, opening on Duplantier street, common to the said lots and others bordering thereon.

Lot number fourteen measures twenty-five feet front on
33 Poeyfarre street, by one hundred and twenty-seven feet four inches in depth between parallel lines, opening in the rear on the alley above referred to, all in conformity with the plan above mentioned, which said lots of ground were acquired by said defendants by said notarial act, which imports a confession of judgment by said defendants in favor of any holder or holders of any of the notes therein described, including the two notes set forth; all which will more fully appear by reference to an authentic copy of said notarial act hereto annexed and made a part hereof, and marked M.

Wherefore petitioner prays, the premises considered, that a writ of seizure and sale issue herein, directed to the sheriff of the parish of Orleans, commanding him to seize and sell the above-described property to pay the notes set forth in said act marked "M," and to pay to petitioner the aforesaid sum of two thousand eight hun-
34 dred and thirty-three 33⅓-100 dollars, with interest at the rate of seven per cent. per annum from the 17th of March, 1860, till the 17th of March, 1862, and at eight per cent. per annum from the 17th of March, 1862, until paid, and three 50-100 dollars costs of copy of act and certificate and all costs; and petitioner prays for all general and equitable relief.

(Signed) DURANT & HORNOR,
Attorneys.

Order.

Let executory process issue in this case as within prayed for and according to law.

New Orleans, February 9th, 1864.

(Signed) R. K. HOWELL, *Judge.*

Note.—Filed February 9th, 1864.

$833 33⅓.

NEW ORLEANS, *March 17th*, 1860.

Two years after date I promise to pay to the order of myself
35 the sum of eight hundred and thirty-three 33⅓-100 dollars for value received, at the Union Bank of Louisiana, in this city,

with interest from date at the rate of seven per cent. per annum till maturity, and if not then punctually paid, to bear interest at the rate of eight per cent. per annum from maturity until final payment.

(Signed) SL. FASNACHT.
LS. FASNACHT.

Paraphed, ne varietur.

New Orleans, April 2d, 1860.
(Signed) J. E. JARREAU, *N. P.*

Endorsed: Pay to the order of Deborah Westerfield. P. A. H. Jackson. (Signed.) Sl. Fasnacht. (Signed.) Ls. Fasnacht.

Endorsed: Pay to the order of Thomas H. Murphy. (Signed.) Peter A. H. Jackson. (Signed.) D. A. Westerfield.

36 *Note.—Filed February 9th*, 1864.

$2,000 00. NEW ORLEANS, *M'ch 17th*, 1860.

Two years after date I promise to pay to the order of ourselves the sum of two thousand dollars for value received, at the Union Bank of Louisiana, in this city, with interest from date at the rate of seven per cent. per annum till maturity; and if not then punctually paid, to bear interest at the rate of eight per cent. per annum from maturity until final payment.

(Signed) SL. FASNACHT.
LS. FASNACHT.

Paraphed, ne varietur.

New Orleans, April 2d, 1860.
(Signed) J. E. JARREAU, *N. P.*

Endorsed: Pay to the order of Deborah Westerfield and
37 Peter A. H. Jackson. (Signed.) Sl. Fasnacht. Ls. Fasnacht.

Endorsed: Pay to the order of Thomas H. Murphy. (Signed.) Peter A. H. Jackson. D. A. Westerfield.

Act of mortgage.—Filed February 9th, 1864.

2nd April, 1860. Sale of property, Mrs. C. Westerfield *et als.* to S. and L. Fasnacht.

STATE OF LOUISIANA, *City of New Orleans:*

Be it known that on this second day of April, in the year of our Lord one thousand eight hundred and sixty, before me, J. Emile Jarreau, a notary public in and for the parish and city of New Orleans, duly commissioned and sworn, and in the presence of the sub-

38 scribing witnesses, personally came and appeared the following-named persons, to wit:

1st. Mrs. Mary P. Murphy, wife of Thomas H. Murphy, of this city, by her said husband duly authorized, herein acting in her own right.

2nd. Mrs. Deborah Westerfield, wife of Cornelius Westerfield, by her said husband duly authorized, residing in the city of New York, herein acting in her own right, and as agent and attorney in fact of the following-named persons by virtue of eleven powers of attorney fully described in and annexed to an act of even date herewith, passed in this office, being a conveyance from the present vendors to N. Pepin, to wit:

3d. Mrs. Jane Ross, wife of William S. Ross, duly authorized by her said husband, residing in Williamsburgh, in the city of Brooklynn, State of New York.

4th. Catharine L. Ross, wife of John L. Ross, duly author-
39 ized by her said husband, and residing in Williamsburgh, in the city of Brooklynn, State of New York.

5th. Mrs. Widow Elisa Jane Bertholf, residing in the city of New York.

6th. Peter J. Bertine, residing in the city of New York.

7th. Simeon B. Johnson, of Yorktown, in the county of Westchester, State of New York.

8th. Mrs. Juliet Carman, wife of Louis Carman, by her husband duly authorized, residing in the county of Jackson, State of Iowa.

9th. Mrs. Elisa J. Matson, wife of Silvestre G. Matson, duly authorized by her husband, residing in Aminosa, in the county of Jones, State of Iowa.

10th. Mrs. Susan J. Carpenter, wife of Samuel Carpenter, by him duly authorized, residing in Angelica, in the county of Alleghanny, State of New York.

40 11th. Mrs Amelia M. Pomroy, wife of Chester W. Pomroy, by her said husband duly authorized, residing in St. Louis, State of Missouri.

12th. Mrs. Harriet Shunts, wife of Jacob Shunts, duly authorized by her husband, residing at Bounsbrook, in the State of New Jersey.

13th. Mrs. Henry J. Smith, residing in Kingston, in the county of Ulster, State of New York.

All the said parties before named being heirs at law of Mrs. Widow Elizabeth McCarter, who died in New York, on the 16th of March, 1859, and whose last will and testament, and three codicils thereto, have been duly admitted to probate in the second District Court New Orleans, in order that the same may be executed, and being recognized as the only heirs of the said Mrs. McCarter by the said court, and having been put in possession of the real estate of which
41 the said Mrs. McCarter died, seized in the city of New Orleans, as it will appear by the certified copies of the orders of said Second District Court of New Orleans, annexed to an act of even date herewith in my office, above referred to; the said Mrs. Mary P. Murphy, and the said Mrs. Deborah Westerfield, herein acting as

aforesaid in their own right, and the latter acting as agent and attorney in fact of the aforenamed parties, severally declared that for the consideration, and on the terms and conditions hereinafter expressed and in confirmation of the sale and adjudication made on the seventeenth day of March instant, at the St. Charles Exchange, by J. B. Walton, a duly licensed auctioneer of this city, whose process verbal is annexed, for reference to an act of even date herewith in
42 my office, and already referred to.

They do by these presents grant, bargain, sell, convey, transfer, assign, set over and deliver with all legal warranty unto Messieurs Louis Fasnacht and Samuel Fasnacht, both of this city, present, accepting and purchasing for themselves, their heirs and assigns, and acknowledging due delivery and possession thereof, the following described property, to wit:

Six certain lots of ground, together with all the buildings and improvements thereon, rights, privileges, customs, ways, servitudes and appurtenances thereunto belonging, or in anywise appertaining, situate in the first district of this city, (formerly municipality No. 2,) in the square bounded by Anunciation, Poeyfarre, Duplantier and Foucher streets, designated by the numbers one, two, three, four and five and fourteen, on a plan drawn by C. A. Hedin, civil
43 engineer, on the eighteenth day of March, 1852, and deposited in the office of H. B. Cenas, a notary public, for reference, which said lots measure as follows, to wit:

Lots numbers one and two, each thirty-two feet eight inches front on Anunciation street, by one hundred and twenty-nine feet five inches in depth between parallel lines, the said lot number one forming the corner of Anunciation and Poeyfarre streets.

Lots numbers three and four, each twenty-five feet front on Annunciation street, by one hundred and twenty-nine feet five inches in depth between parallel lines.

Lot number five, twenty-five feet front on Anunciation street, twenty-five feet in width, in the rear on an alley nine feet seven inches wide, opening on Duplantier street, common to said lots and others bordering thereon; and lot number fourteen measures twenty-five feet front on Poeyfarre street, by one hundred and
44 twenty-seven feet four inches in depth between parallel lines opening in the rear on the alley above referred to, all in conformity with the plan above mentioned, which said lots of ground were acquired by the said Mrs. McCarter from the succession of Cornelius Paulding, by an act passed in the office of H. B. Cenas, notary public, on the 6th of May, 1852.

To have and to hold the said six lots of ground unto the said purchasers, their heirs and assigns, to their proper use and behoof forever.

And the said vendors for themselves and their heirs, the said six lots of ground to the said purchasers, their heirs and assigns, shall and will warrant and forever defend against the lawful claims of all persons whomsoever by these presents; and the said vendors do moreover subrogate the said purchasers to all the rights and

45 actions of warranty which they have or may have against their own vendor, or against the vendor of their vendor, fully authorizing the said purchasers to exercise the said rights and actions in the same manner as they could or might have done.

This sale is made and accepted for and in consideration of the total price and sum of twenty thousand five hundred dollars, price for which said property was adjudicated to the said purchasers in part payment, and deduction of which said purchasers have paid in cash the sum of six thousand eight hundred and thirty-three dollars and thirty-three and one-third cents to the said vendors, who hereby acknowledge the receipt thereof, and grant full discharge and acquittance for the same and for the remainder of said price, say the sum of thirteen thousand six hundred and sixty-six
46 dollars sixty-six and two-thirds cents, the said purchasers, in conformity with the terms and conditions of the said adjudication, have furnished the following eight promissory notes, dated on the seventeenth of March instant, day of said adjudication, drawn by themselves to their own order and by them endorsed, bearing seven per cent. per annum interest from date until maturity, and eight per cent. per annum interest thereafter until final payment, to wit:

Three notes for the sum of two thousand dollars each, and one note for the sum of eight hundred and thirty-three dollars thirty-three and one-third cents, payable one year after date, and three notes for the sum of two thousand dollars each, and one note for the sum of eight hundred and thirty-three dollars and thirty-three and one-third cents, payable two years after date, and at the
47 Union Bank of Louisiana, in this city, which said eight notes were marked ne varietur, and countersigned by me, notary, for the purpose of identification herewith, and were delivered to the said vendors, who hereby ackkowledge the receipt thereof.

Now, therefore, in order to secure the full and punctual payment of said notes in principal and interest, with all eventual interest, costs, charges and expenses, as the case may be, the said purchasers do by these presents mortgage and specially hypothecate the above-described and conveyed six lots of ground in favor of their vendors, and in favor of any future holders of said notes, binding themselves not to sell, mortgage, nor in any manner alienate said property to the prejudice of this mortgage, and hereby confessing judgment for the amount of his said notes herewith identified in principal,
48 interest and costs.

In order more effectually to secure the full and punctual payment of said notes in principal and interest, it is hereby agreed and understood that the said purchasers shall cause the buildings on the above-described six lots of ground to be insured against fire in one of the insurance companies of this city during the continuance of this mortgage, and shall transfer the policy of insurance to the said vendors, or to any future holders of said note, which insurance shall continue to be renewed from time to time until the final payment of these notes herewith identified; and in default of the said

purchasers causing the said insurance to be effected, it shall be lawful for the said vendors, or any future holders of said notes, to have the said buildings insured and the premium and other expenses incurred for obtaining said insurance of for renewing
49 the same shall be charged to said purchasers, and the same shall be recovered under and by virtue of the clauses and stipulations of this act, which are made and intended expressly to secure all costs incurred for the recovery of said notes.

By reference to the mortgage certificate from the recorder of mortgages, in and for this parish, of even date herewith, and annexed to an act passed this day in my office, it will appear that there is no mortgage whatever recorded in the name of Mrs. McCarter against the property herein described and conveyed.

All the State and city taxes on the said property have been paid up to January, 1860, and as per receipt exhibited to me, the undersigned notary, and the present purchasers bind themselves to pay the taxes for the year 1860, when the same shall be presented for collection.

50 This done and passed in my office, in the city of New Orleans, on this second day of April, eighteen hundred and sixty, in the presence of Adolphe Mazureau and J. Winn Jarreau, competent witnesses, who have hereunto signed their names with said parties and me, notary, after reading the whole.

(Signed) D. A. WESTERFIELD.
MARY PATTON MURPHY.
T. H. MURPHY.
C. WESTERFIELD.
S. FASNACHT.
L. FASNACHT.

Signed:
A. MAZUREAU.
J. W. JARREAU.

J. E. JARREAU, *N. P.*

The foregoing is a true copy of the original act extant in the office of J. Emile Jarreau, late notary public, whose registers are in my possession and custody as his successor in office.

51 New Orleans, November 4th, 1863.

[SEAL.] (Signed) FELIX McCULLOCH,
Notary Public.

OFFICE OF MORTGAGES.

The undersigned, recorder of mortgages for the parish of Orleans, city of New Orleans, State of Louisiana, certifies that the within deed was recorded in his office, in B. 75, fo. 159, under date of the 9th of April.

New Orleans, February the thirteenth, 1864.

(Signed) J. W. MADDEN, *D'y Rec.*

Sixth District Court of New Orleans, State of Louisiana.

Writ of seizure.—Issued February 9th, 1864.

THOMAS H. MURPHY
vs.
S'L & LS. FASNACHT. } No. 11058.

52 The State of Louisiana to the sheriff of the parish of Orleans, greeting:

You are hereby commanded, in the name of the State of Louisiana and of the sixth District Court of New Orleans, to seize and sell, after the legal delays and advertisements, according to law, to pay and satisfy plaintiff's claim, viz., the sum of two thousand eight hundred and thirty 33½-100 dollars, with interest at the rate of seven per cent. per annum from the 17th March, 1860, till the 17th March, 1862, and at eight per cent. per annum from the 17th March, 1862, until paid, and three and 50-100 dollars costs of acts and certificate, and all costs, the following described property:

Six certain lots of ground, together with all the buildings and improvements thereon, rights, privileges, customs, ways, servitudes and appurtenances thereunto belonging, or in any way appertaining, situate in the first district of this city, formerly municipality number two, in the square bounded by Anunciation, Poeyfarre, Duplantier and Foucher streets, designated by the numbers one, two, three, four, five and fourteen, on a plan drawn by C. A. Hedin, civil engineer, on the 18th day of March, 1852, and deposited in the office of H. B. Cenas, notary public, for reference, which said lots measure as follows, to wit: Lots numbers one and two, each 32 feet 8 inches front on Anunciation street by 129 feet 5 inches in depth between parallel lines; the said lot number one forming the corner of Anunciation and Poeyfarre streets; lots numbers three and four, each 25 feet front on Anunciation street, by 129 feet 5 inches in depth between two parallel lines; lot number five, 25 feet front on Anunciation street, 25 feet in width in the rear on an alley, nine feet seven inches wide, opening on Duplantier street, common to the said lots, and others bordering thereon; and lot number fourteen measures 25 feet front on Poeyfarre street by 129 feet 4 inches in depth between parallel lines, opening in the rear on the alley above referred to; all in conformity with the plan above mentioned.

53

54

And what you do in the premises you make return thereof, together with this writ, to our said court, as the law directs.

Witness the Honorable R. K. Howell, judge of our said court, this ninth day of February, in the year of our Lord one thousand eight hundred and sixty-four, and in the eighty-eighth year of the independence of the United States.

(Signed) F. DELCUR, *D'y Cl'k.*

In the Sixth District Court of New Orleans.

Sheriff's notice.—Issued February 10th, 1864.

THOMAS H. MURPHY
vs.
55 SAM'L & LOUIS FASNACHT. } No. 11058.

SHERIFF'S OFFICE OF THE PARISH OF ORLEANS,
NEW ORLEANS, *February, 10th*, 1864.

To Samuel and Louis Fasnacht:

Take notice, that payment is demanded of you at my office, within three days from the service hereof, of the amount claimed in the accompanying petition, with interest and costs, and in default of payment within that delay the property referred to in said petition will be sold according to law.

(Signed) MICH'L DE ARMAS,
D'y Sheriff.

Return on notice.

On the 11th day of February, 1864, served copy of the within notice of demand of payment and accompanying petition per-
56 sonally on Samuel Fasnacht, one of the defendants herein.

(Signed.) B. ALBERT, *D'y Sh'ff.*

In the Sixth District Court of New Orleans.

Sheriff's notice of seizure.—Issued February, 16th, 1864.

THOMAS H. MURPHY
vs.
SAM'L & LOUIS FASNACHT. } No. 11058.

SHERIFF'S OFFICE OF THE PARISH OF ORLEANS.

To Samuel and Louis Fasnacht:

Take notice, that I have seized, and in three days from the service hereof shall proceed to advertise and sell, according to law, the following described property, to wit:

Six certain lots of ground, together with all the buildings and improvements thereon, rights, privileges, customs, ways, servitudes and appurtenances thereunto belonging, or in any
57 way appertaining, situate in the first district of this city (formerly municipality number two) in the square bounded by Anunciation, Poeyfarre, Duplantier and Foucher streets, designated by the numbers one, two, three, four, five and fourteen, on a plan drawn by C. A. Hedin, civil engineer, on the 18th day of March 1852, and deposited in the office of H. B. Cenas, late a notary public in this city, for reference; which said lots measure as follows, to wit: Lots numbers one and two each thirty-two feet eight inches

front on Anunciation street, by one hundred and twenty-nine feet five inches in depth between parallel lines, the said lot number one forming the corner of Anunciation and Poeyfarre streets, lots numbers three and four, each twenty-five feet front on Anunciation street, by one hundred and twenty-nine feet five inches in depth be-
58 tween parallel lines; lot number five, twenty-five feet front, on Anunciation street, twenty-five feet in width in the rear on an alley nine feet seven inches wide, opening on Duplantier street, common to said lot and others bordering thereon; and lot number fourteen measures twenty-five feet front on Poeyfarre street by one hundred and twenty-seven feet four inches in depth, between parallel lines opening in the rear on the alley above referred to, and all in conformity with the plan above mentioned, to pay and satisfy the writ issued in this case, (say the sum of $2,833 33⅓,) with interest and costs unless the same is immediately paid.

(Signed) MICH'L DE ARMAS, *D'y Sheriff.*

Sheriff's return on notice of seizure.

On the 16th day of February, 1864, I served a copy of the
59 within notice on Samuel Fasnacht, one of the defendants herein in person.

(Signed) B. ALBERT, *D'y Sheriff.*

Sheriff's return on writ.—Filed February 29th, 1864.

Received February 10th, 1864, and on the fourteenth day of same month and year served copy of the within annexed notice of demand of payment and accompanying petition personally on Samuel Fasnacht, one of the defendants herein; and none of said defendants having paid within the legal delay, I, on the sixteenth day of same month and year, seized the within-described property, and notified personally the said defendant, Samuel Fasnacht, of the seizure.

When, on the 20th day of February, 1864, previous to advertising, the further execution of this writ was stayed by a suspensive
60 appeal. This return is made up to the present time for the purpose of enabling the clerk to complete a transcript of appeal herein taken.

The clerk is requested to return this writ to the sheriff, after copying the same.

Returned February 26th, 1864.

(Signed) MICH'L DE ARMAS, *D'y Sheriff.*

Petition of appeal.—Filed February 15th, 1864.

To the honorable the judge of the sixth District Court of New Orleans:

The petition of Samuel Fasnacht and Louis Fasnacht, both residing in the city of New Orleans, respectfully shows that there is error to their prejudice in the judgment of the court ordering executory

process against their property in the suit of Thomas H. Murphy against your petitioner, being No. 11058 of the docket of this honorable court.

61 Wherefore they pray that a suspensive appeal be allowed them to the Supreme Court upon their furnishing security according to law, and that said Murphy be cited to answer said appeal.

(Signed) G. SCHMIDT, *Attorney.*

Order.

Let a suspensive appeal be granted in this case, as prayed for, upon the appellant giving bond with good and solvent security conditioned as the law directs, said appeal to be made returnable to the Supreme Court of Louisiana on or before the first Monday of May next, 1864.

New Orleans, February 15th, 1864.

(Signed) R. K. HOWELL, *Judge.*

Bond.—Filed February 16th, 1864.

Know all men by these presents, that we, Samuel and Louis Fasnacht as principals, and William Creppel, are held and

62 firmly bound unto Thomas H. Murphy, his executors, administrators and assigns, in the sum of six thousand dollars, for the payment whereof we bind ourselves, our heirs, executors and administrators firmly by these presents.

Sealed with our seals, and dated in the city of New Orleans, on this 15th day of February, in the year of our Lord one thousand eight hundred and sixty-four.

Whereas the above-bounden Samuel and Louis Fasnacht have this day filed a petition of appeal from a final judgment rendered against them in the suit of Thomas H. Murphy *vs.* Samuel and Louis Fasnacht, in the Sixth District Court of New Orleans, on the 9th day of February, 1864:

Now the condition of the above obligation is such that the

63 above-bounden Samuel and Louis Fasnacht shall prosecute said appeal, and shall satisfy whatever judgment may be rendered against them, or that the same shall be satisfied by the proceeds of the sale of their estate, real or personal, if they be cast in the appeal; otherwise that the said William Creppel, surety, shall be liable in their place.

(Signed) SAMUEL & LOUIS FASNACHT.
WILLIAM CREPPEL.

Signed, sealed and delivered in the presence of—

(Signed) G. SCHMIDT.

Sixth District Court of New Orleans.

Citation of appeal.

The State of Louisiana to Mr. Murphy, greeting:

Whereas Samuel and Louis Fasnacht has, on the 15th day
64 of February, filed in the office of the clerk of the sixth District Court of New Orleans a petition of appeal from a certain final judgment rendered in the said court against them, which appeal is returnable in the Supreme Court for the State of Louisiana on the first Monday of May, 1864:

You are therefore hereby cited to appear, in person or by attorney, in the said court on the day last aforesaid, to answer the said appeal.

Witness the honorable judge of the court aforesaid this 16th day of February, in the year of our Lord one thousand eight hundred and sixty-four.

(Signed) E. H. LEHMAN, *D'y Clerk.*

Sheriff's return.—Filed February 9th, 1864.

Received February 17th, 1864, and on the 19th day of the
65 same month and year I served a copy of the within petition for appeal personally on Thomas Murphy, plaintiff herein.

Returned same day.

(Signed) B. ALIBERT, *D'y Sheriff.*

Rule to dismiss appeal.—Filed February 18th, 1864.

On motion of Durant & Horner, attorneys for the plaintiff, it is ordered by the court that defendant show cause on Thursday, the 25th day of February, 1864, at 10 o'clock a. m., why the appeal herein taken should not be set aside and dismissed on the following grounds, to wit: First. That the surety on the appeal bond is not good and solvent and such as the law requires.

Sheriff's return.—Filed February 19th, 1864.

Received February 18th, 1864, and on the 19th day of the
66 same month and year I served a copy of the within rule on Samuel Fasnacht, one of the defendants herein, in person.

Returned same day.

(Signed) B. ALIBERT,
D'y Sheriff.

Evidence on trial of rule.—Filed February 25th, 1864.

Wm. Creppel sworn.

Is shown the bond; says: I signed the bond. I reside in New Orleans. I am worth six thousand dollars after the payment of all my debts.

Cross-examined.

I reside at No. 148 Annunciation street. I am a married man; my wife brought me something in marriage; can't tell exactly how much. Her mother is living yet; she has property. We did not make a marriage contract. I have bought property since I am married. I
67 have real estate in this city in 1st district, 2d district and in 4th district. I have some at St. Mary's market and Poydras street. I pay over $500 taxes; it cost over $40,000 00. I have one note to pay of $3,240 00, to pay yet on my property; that is the only mortgage on my property. This property is in my name. I have children. Could not tell how much my wife brought in marriage; it was not more than $5,000 00. We are married 21 years. My wife has not received any property in her own right by donation or otherwise since her marriage with me. I am an under tutor; am not curator or administrator.

Hearing and dismissing rule.—Minutes February 25th, 1864.

The rule to dismiss the appeal herein came up to-day for trial: J. P. Horner for plaintiff, G. Schmidt for defendant. When, after
68 hearing pleadings and evidence, the court considering the evidence, it is adjudged and decreed that said rule be dismissed with costs.

Supreme Court of the State of Louisiana.

Decree of the Supreme Court.—Filed February 11th, 1867.

THOMAS H. MURPHY
vs.
SAMUEL & L. FASNACHT. } No. 591.

CLERK'S OFFICE, NEW ORLEANS, *January 28th*, 1867.

Appeal from the sixth District Court of New Orleans.

Mr. Judge Ilsley rendered the opinion of the court in the words and figures following to wit:

This is an appeal from an order of seizure and sale, and the only question presented is simply whether the plaintiff, who pro-
69 duced no authentic title to the notes sued on, can proceed for their recovery, "via execution." This is not an open question.

The judge in granting the order can take no cognizance of any other than authentic evidence. (See 8 An., 117; 5 An., 124; 6 A., 477; 10 An., 275; xi A.,4.

By a previous judgment of this court the order of seizure and sale was inadvertently maintained.

It is therefore ordered, adjudged and decreed that the order of seizure and sale allowed by the judge of the lower court be re-

scinded and annulled at the costs of the appellee. Judge Howell recused.

A true copy.

[SEAL.] (Signed) C. M. ILSLEY,
D'y Clerk.

Clerk's certificate.

I, William Woelper, clerk of the sixth District Court of New Orleans, do hereby certify that the above and foregoing forty-
70 four pages contains a full, true and correct transcript of all proceedings had, documents filed and evidence adduced on the trial of the cause wherein Thomas H. Murphy is plaintiff and Samuel and Louis Fasnacht are defendants, known and numbered on the docket of said court as No. 11,058, and also the decree of the Supreme Court of this State.

In testimony whereof I have hereunto set my hand and affixed the impress of the seal of this court, on this the 5th day of February, in the year of our Lord one thousand eight hundred and sixty-eight, and the ninety-second of the independence of the United States of America.

[SEAL.] (Signed) WM. WOELPER, *Clerk.*

71 I, Guy Duplantier, sole judge of the sixth District Court of New Orleans, do hereby certify that William Woelper is the clerk of said court, that the same is a court of record having common law jurisdiction, and that the signature, William Woelper, to the foregoing certificate is in the proper handwriting of him the said William Woelper, clerk. To his official acts as such full faith and credit are due and owing. And I do further certify that his attestation is in due form of law.

Given under my hand and seal, at the city of New Orleans, on this 5th day of February, in the year of our Lord one thousand eight hundred and sixty-eight.

(Signed) G. DUPLANTIER, *Judge.*

I, William Woelper, clerk of the sixth District Court of New Orleans, do hereby certify that Guy Duplantier is the judge of
72 said Court, that the same is a court of record having common law jurisdiction, and that the signature, G. Duplantier, judge, to the foregoing certificate is in the proper handwriting of him the said Guy Duplantier, judge; and I do further certify that his attestation is in due form of law.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at the city of New Orleans, on this the 5th day of February, in the year of our Lord one thousand eight hundred and sixty-eight, and in the ninety-second year of the independence of the United States of America.

[SEAL.] (Signed) WM. WOELPER, *Clerk.*

Transcript of record in case No. 19,649, from 6th District Court of New Orleans, filed for plaintiff February 21st, 1868; offered
73 in evidence February 28th, 1868, by defendants; also by plaintiffs May 18th, 1868.

Sixth District Court of New Orleans.

Petition.—Filed February 18th, 1867.

THOMAS H. MURPHY
vs.
SAMUEL AND LOUIS FASNACHT. } No. 19649.

STATE OF LOUISIANA, *City of New Orleans:*

To the Hon. Guy Duplantier, judge of the Sixth District Court of New Orleans:

The petition of Thomas H. Murphy, who resides in New Orleans, respectfully shows that Samuel Fasnacht and Louis Fasnacht, who also reside in this city, are justly and truly indebted in solido unto your petitioner in the full sum of two thousand eight hundred and thirty-three 33⅓-100 dollars, with interest at seven per cent.
74 per annum from the 17th day of March, 1860, to the 17th of March, 1862, and thereafter at the rate of eight per cent. per annum, together with three 50-100 dollars, costs of copy of notarial act, and costs of suit for this, to wit: that petitioner is holder and owner of two certain promissory notes, one for two thousand dollars and the other for eight hundred and thirty-three 33⅓-100 dollars, both drawn by said Samuel and Louis Fasnacht to their own order, and by them endorsed; both dated New Orleans, March 17th, 1860, and payable two years after date, with interest at the rate of seven per cent. per annum from date till maturity, and at eight per cent. per annum from maturity until final payment, and both paraphed "Ne Varietur," New Orleans, April 2d, 1860, J. E. Jarreau, notary public; all which will more fully appear by reference to the said promissory notes, which are hereunto annexed and made part hereof, and
75 marked T and H.

Petition further shows that by public act passed before J. E. Jarreau, then a notary of this city, on the 2d day of April, 1860, in order to secure the payment of the aforesaid notes, and others set forth in said act, to any holder thereof, the said Samuel and Louis Fasnacht did specially mortgage and hypothecate, in favor of any holder or holders as aforesaid, six certain lots of ground, with the buildings and improvements thereon, situate in the first district of this city, in the square bounded by Annunciation, Poeyfarre, Duplantier and Foucher streets, designated by the numbers one, two, three, four, five and fourteen, on a plan drawn by A. C. Hedin, on the 18th March, 1852, and deposited in the office of H. B. Cenas, notary public, for reference; which said act of mortgage imports a confession of judgment in favor of any holder or holders of said notes,
76 all of which will more fully appear by reference to an authen-

tic copy of said notarial act hereto annexed, and made part hereof and marked "M."

Wherefore your petitioner prays that the said Samuel and Louis Fasnacht be cited to appear and answer this petition, and, after due proceeding had, that your petitioner do have and recover judgment against said Samuel and Louis Fasnacht in the aforesaid sum of $2,833 33⅓-100 dollars, with interest thereon at 7 per cent. per annum from 17th March, 1860 till 17th March, 1862, and at 8 per cent. per annum thereafter until final payment, $3 50-100 copy of act and costs of suit.

And petitioner prays that his special mortgage and privilege on said property be recognized.

(Signed) HORNOR & BENEDICT.
Attys for Pet'r.

Note.—Filed February 18th, 1867.

$2,000 NEW ORLEANS, *March 17th*, 1860.

77 Two years after date we promise to pay to the order of ourselves two thousand dollars, value received, at the Union Bank of Louisiana, in this city, with interest from date at the rate of seven per cent. per annum till maturity; and if not then punctually paid to bear interest at the rate of eight per cent. per annum from maturity until final payment.

(Signed) S'L FASNACHT.
" L'S FASNACHT.

Paraphed: Ne varietur—New Orleans, April 2d, 1860.
(Signed) J. E. JARREAU, *N. P.*

Endorsed: Pay to the order of Deborah Westerfield and Peter A. H. Jackson.
(Signed) S'L FASNACHT.
" L'S FASNACHT.

Endorsed: Pay to the order of Thomas H. Murphy.
(Signed) PETER A. H. JACKSON.
" D. A. WESTERFILD.

Note.—Filed February 18th, 1867.

78 $833 33⅓-100. NEW ORLEANS, *March 17th*, 1860.

Two years after date I promise to pay to the order of myself eight hundred and thirty-three 33⅓-100 dollars, for value received, at the Union Bank of Louisiana, in this city, with interest from date at the rate of seven per cent. per annum till maturity; and if not then punctually paid, to bear interest at the rate of eight per cent. per annum from maturity until final payment.

(Signed) S'L FASNACHT.
" L'S FASNACHT.

Paraphed: Ne varietur—New Orleans, April 2d, 1860.
(Signed) J. E. JARREAU, *N. P.*

Endorsed: Pay to the order of Deborah Westerfield and Peter A. H. Jackson.
(Signed) S'L FASNACHT.
L'S FASNACHT.

Endorsed: Pay to the order Thomas H. Murphy.
79 (Signed) PETER A. H. JACKSON.
" D. A. WESTERFIELD.

Act of mortgage.—Filed February 18th, 1867.

Sale of property—Mrs. C. Westerfield & als. to L. & S. Fasnacht.

STATE OF LOUISIANA, *City of New Orleans:*

2nd April, 1860.

Be it known that on this second day of the month of April, in the year of our Lord one thousand eight hundred and sixty, before me, J. Emile Jarreau, a notary public in and for the parish and city of New Orleans, duly commissioned and sworn, and in the presence of the subscribing witnesses, personally came and appeared the following named persons, to wit:

1°. Mrs. Mary P. Murphy, wife of Thomas H. Murphy, of this city, by her said husband duly authorized herein, acting in
80 her own right.

2°. Mrs. Deborah Westerfield, wife of Cornelius Westerfield, by her said husband duly authorized, residing in the city of New York, herein acting in her own right, and as agent and attorney-in-fact of the following named persons, by virtue of eleven powers of attorney, fully described in and annexed to an act of even date herewith, passed in this office, being a conveyance from the present vendors to N. Pepin.

3d. Mrs. Jane Ross, wife of William S. Ross, duly authorized by her said husband, residing in Williamsburgh, in the city of Brooklyn, State of New York.

4th. Catherine L. Ross, wife of John L. Ross, duly authorized by her said husband, and residing in Williamsburgh, in the city of Brooklyn, State of New York.

81 5th. Widow Eliza Jane Berthoff, residing in the city of New York.

6th. Peter J. Bertine, residing in the city of New York.

7th. Simeon B. Johnson, of Yorktown, in the county of Westchester, State of New-York.

8th. Mrs. Juliet Carman, wife of Lewis Carman, by her husband duly authorized, residing in the county of Jackson, State of Iowa.

9th. Mrs. Eliza J. Matson, wife of Silvester G. Matson, duly authorized by her said husband, residing in Aminosa, in the county of Jones, State of Iowa.

10th. Mrs. Susan A. Carpenter, wife of Samuel Carpenter, by him duly authorized, residing in Angelica, in the county of Alleghanny, State of New York.

11th. Mrs. Amelia M. Pomroy, wife of Chester W. Pomroy, by her said husband duly authorized, residing in St. Louis, State of Missouri.

12th. Mrs. Harriet Shunts, wife of Jacob Shunts, duly au-
82 thorized by her husband, residing at Bounsbrook, in the State of New Jersey.

13th. Mrs. Henry J. Smith, residing at Kingston, in the county of Ulster, State of New York.

All the said parties beforenamed being heirs-at-law of Mrs. Widow Elizabeth McCarter, who died at New York on the 16th of March, 1859, and whose last will and testament, and three codicils thereto, have been duly admitted to probate in the second District Court of New Orleans, in order that the same may be executed, and being recognized as the only heirs of the said Mrs. McCarter, by the said court, and having been put in possession of the real estate of which the said Mrs. McCarter died seized in the city of New Orleans, as it will appear by reference to the certified copies of the orders of said second District Court of New Orleans, annexed to an act of even date herewith, in my office above referred to.

83 The said Mrs. Mary P. Murphy, and the said Mrs. Deborah Westerfield, herein acting as aforesaid in their own rights, and the latter acting as agent and attorney-in-fact of the aforenamed parties, severally declared: that for the consideration and on the terms and conditions hereinafter expressed, and in confirmation of the sale and adjudication made on the seventeenth day of March instant, at the St. Charles Exchange, by J. B. Walton, a duly licensed auctioneer of this city, whose process verbal is annexed for reference to an act of even date herewith, in my office, and already referred to.

They do, by these presents, grant, bargain, sell, convey, transfer, assign, set over and deliver, with all legal warranty, unto Messieurs Louis Fasnacht, and Samuel Fasnacht, both of this city, present, accepting and purchasing for themselves, their heirs and assigns,
84 and acknowledging due delivery and possession thereof, the following described property, to wit:

Six certain lots of ground together with all the buildings and improvements thereon, rights, privileges, customs, ways, servitudes and appurtenances thereunto belonging, or in any wise appertaining, situate in the first district of this city, formerly municipality "No. two," in the square bounded by Anunciation, Poeyfarre, Duplantier, and Foucher streets, designated by the numbers one, two, three, four, five and fourteen, on a plan drawn by C. A. Hedin, civil engineer, on the eighteenth day of March, 1852, and deposited in the office of H. B. Cenas, notary public, for reference, which said lots measure as follows, to wit:

Lots numbers one and two, each thirty-two feet eight inches front on Anunciation street, by one hundred and twenty-nine feet
85 five inches in depth, between parallel lines; the said lot number one forming the corner of Anunciation and Poeyfarre streets.

Lots, numbers three and four, each twenty-five feet front on Anunciation street, by one hundred and twenty-nine feet five inches in depth, between parallel lines.

Lot number five, twenty-five feet front on Anunciation street, twenty-five feet in width in the rear, on an alley nine feet seven inches wide, opening on Duplantier street, common to the said lots, and others bordering thereon.

And lot number fourteen measures twenty-five feet front on Poeyfarre street, by one hundred and twenty-seven feet four inches in depth, between parallel lines, opening in the rear on the alley above referred to, all in conformity with the plan above mentioned, which said lots of ground were acquired by the said Mrs. McCarter from the succession of Cornelius Paulding, by an act passed, of H.
86 B. Cenas, notary public, on the 6th of May, 1852, to have and to hold the said six lots of ground unto the said purchasers, their heirs or assigns, to their proper use and behoof, forever. And the said vendors for themselves and their heirs, the said six lots of ground to the said purchasers, their heirs or assigns, shall and will warrant and forever defend against the lawful claims of all persons whomsoever, by these presents. And the said vendors do moreover subrogate the said purchasers to all the rights and actions or warranty which they have or may have against their own vendor, fully authorizing the said purchasers to authorize the said rights and actions in the same manner as they could or might have done.

This sale is made and accepted for and in consideration of the total price and sum of twenty thousand five hundred dollars,
87 price for which said property was adjudicated to the said purchasers, in part payment and deduction of which said purchasers have paid in cash the sum of six thousand eight hundred thirty-three dollars and thirty-three and one-third cents to the said vendors, who hereby acknowledge the receipt thereof, and grant full discharge and acquittance for the same; and for the remainder of said price, say the sum of thirteen thousand six hundred and sixty-six dollars and sixty-six and two-thirds cents, the said purchasers, in conformity with the terms and conditions of the said adjudication, have furnished the following eight promissory notes, dated on the seventeenth of March instant, day of adjudication drawn by themselves to their own order, and by them endorsed, bearing seven per cent. per annum interest from date until maturity, and eight
88 per cent. per annum interest thereafter until final payment, to wit: Three notes for the sum of two thousand dollars each, and one note for the sum of eight hundred and thirty-three dollars thirty-three and one-third cents, payable one year after date; three notes for the sum of two thousand dollars each, and one note for the sum of eight hundred thirty-three dollars thirty-three and one-third cents, payable two years after date, and at the Union Bank of Louisiana in this city; which said eight notes were marked "Ne varietur," and countersigned by me, notary, for the purpose of identification herewith, and were delivered to the said vendors, who hereby acknowledge the receipt thereof. Now therefore, in order to secure

the full and punctual payment of said notes, in principal and
89 interest, with all eventual interest, costs, charges and expenses, as the case may be, the said purchasers do by these presents, mortgage and specially hypothecate the above described and conveyed six lots of ground in favor of their vendors, and in favor of any future holder of said notes, binding themselves not to sell, mortgage, nor in any manner alienate said property, to the prejudice of this mortgage, and hereby confessing judgment for the amount of his said notes, herewith identified, in principal, interest and costs.

In order more effectually to secure the full and punctual payment of said notes in principal and interest, it is hereby agreed and understood that the said purchasers shall cause the buildings on the above-described six lots of ground to be insured against fire in one of the insurance offices of this city, during the continuance of this mortgage, and shall transfer the policy of insurance to the
90 said vendors, or any future holder of said notes, which insurance shall continue to be renewed from time to time until the final payment of these notes herewith identified; and in default of the said purchasers causing the said insurance to be effected, it shall be lawful for the said vendors, or any future holders of said notes, to have the said buildings insured and the premium and other expenses incurred for obtaining said insurance, or for renewing the same, shall be charged to the said purchasers, and the same shall be recovered under and by virtue of the clauses and stipulations of this act, which are made and intended to secure all costs incurred for the recovery of said notes.

By reference to mortgage certificate from the recorder of mortgages in and for this parish, of even date herewith, and annexed
91 to an act passed this day in my office, it will appear that there is no mortgage whatever recorded in the name of Mrs. McCarter against the property herein described and conveyed.

All the State and city taxes on the said property have been paid up to January, 1860, and, as per receipt exibited to me, the undersigned notary and the present purchasers bind themselves to pay the taxes for the year 1860, when the same shall be presented for collection.

This done and passed in my office, at the city of New Orleans, on this second day of April, eighteen hundred and sixty, in the presence of Adolphe Mazureau and J. Ursin Jarreau, competent witnesses, who have hereunto signed their names, with said parties and me, notary, after reading this whole.

92 (Signed) D. A. WESTERFIELD.
MARY PATTON MURPHY.
T. H. MURPHY.
C. WESTERFIELD.
S. FASNACHT.
L. FASNACHT.
(Signed) J. E. JARREAU, *N. P.*
(Signed) A. MAZUREAU,
J. U. JARREAU.

The foregoing is a true and correct copy of the original act, extant in the office of J. Emile Jarreau, late notary public, whose registers are in my possession and custody as his successor in office.

New Orleans, November 14th, 1863.

(Signed) FELIX McCULLOCH,
Notary Public.

OFFICE OF MORTGAGES.

The undersigned, recorder of mortgages for the parish of Orleans State of Louisiana, certifies that the within deed was recorded in his office, M. B. 75, fo. 159, under date of the 9th of April, 1860.

93 New Orleans, February the fourteenth, 1864.

(Signed) J. W. MADDEN,
D'p'y Rec'r.

Sixth District Court of New Orleans, State of Louisiana.

Citation.—Issued February 18th, 1867.

THOMAS H. MURPHY
vs.
SAMUEL & LOUIS FASNACHT. } No. 19469.

Mr. Louis Fasnacht:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the sixth District Court of New Orleans in ten days after the service hereof.

Witness the Honorable S. Duplantier, judge of the said court, the 18th day of February, in the year of our Lord, 1867.

(Signed) WM. WOELPER, *Clerk.*

94 *Sheriff's return.—Filed March 12th,* 1867.

Received February 18th, 1867. On the 9th day of March, 1867, served copy of the within citation and accompanying petition on Louis Fasnacht, defendant herein, at his late domicil at the corner of Anunciation and Poeyfarre streets, by leaving the same into the hands of A. Erath, a person apparently over the age of fourteen years, living and residing at the said domicil, and whose name and other facts I learned by interrogating him; the said Louis being absent from home at the time of said service, and returned same day.

Served by order of Benedict, one of the law firm of Hornor & Benedict, attorneys for plaintiff herein.

(Signed) JOHN HECTOR,
Deputy Sheriff.

Sixth District Court of New Orleans, State of Louisiana.

95 *Citation.—Issued February 18th, 1867.*

THOMAS H. MURPHY
vs.
SAMUEL & LOUIS FASNACHT. } No. 19469.

To Mr. Samuel Fasnacht :

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the sixth District Court of New Orleans, in ten days after the service hereof.

Witness the Honorable G. Duplantier, judge of the said court, the 18th day of February in the year of our Lord 1867.

(Signed) WM. WOELPER, *Clerk.*

96 *Sheriff's return.—Filed March 15th, 1867.*

Received February 18th, 1867. On the 9th day of March, 1867, served copy of the within citation and accompanying petition on Samuel Fasnacht, defendant herein, at his late domicil, corner of Anunciation and Poeyfarre streets, by leaving the same into the hands of A. Erath, a person apparently over the age of fourteen years, living and residing at the said domicil, and whose name and other facts I learned by interrogating him. The said Samuel Fasnacht being absent from home at the time of said service, and returned same day.

Served by order of plaintiff's attorneys, Benedict, one of the said law firm of Hornor & Benedict, attorneys for plaintiff.

(Signed) JOHN HECTOR,
Deputy Sheriff.

Sixth District Court.

97 *Plea to jurisdiction.—Filed March 12th, 1867.*

THOMAS H. MURPHY
vs.
SAMUEL AND LOUIS FASNACHT. } No. 19469.

The defendants in this suit come into court by their undersigned attorney for the sole purpose of informing the court that they reside in the parish of Plaquemine, and that having been informed that petition and citation having been left for them in New Orleans in the above suit, they say that they cannot be cited to answer plaintiff's petition in this court, which has no jurisdiction over them.

Wherefore they pray that plaintiff's petition be dismissed.

(Signed) G. SCHMIDT, *Attorney.*

Order fixing exception.

Extract from minutes, March 20th, 1867:

98 On motion of Hornor & Benedict, attorneys for plaintiff in this cause, it is ordered that exception herein filed by defendants be fixed for Tuesday next, at 10 o'clock a. m.

Sixth District Court of New Orleans, State of Louisiana.

Notice of trial.—Issued March 20th, 1867.

THOMAS H. MURPHY
vs.
SAMUEL AND LOUIS FASNACHT. } No. 19469.

To G. Schmidt, Esq.:

Please to take notice that the exception of defendants in the above-entitled cause is fixed for trial on the 26th day of March, 1867, at 10 o'clock a. m.

(Signed) GASP JAMES, *Clerk.*

Sheriff's return on notice of trial.

99 Received March 21st, 1867, and on same day served copy of the within notice on G. Schmidt, esq., who accepted service hereof.

(Signed) PAUL T. ABADIE,
D'y Sheriff.

Hearing and dismissing exception.

Extract minutes, March 26th, 1867:

This case came on to-day for trial, W. S. Benedict for plaintiff; defendants absent and not represented. When, after hearing pleadings, evidence and counsel, the court having duly considered pleadings and law, it is ordered and decreed that said exception be overruled, with costs.

6th District Court.

Rule.—Filed March 26th, 1867.

MURPHY
vs.
SAMUEL AND LOUIS FASNACHT. }

On motion of G. Schmidt, of counsel for defendants, ordered that plaintiff show cause, on Friday, the 15th day of April next,
100 why the exception to the jurisdiction should not be reinsta-

ted, on the ground that it is not true that the defendants' attorney accepted service of the notice of the trial of the exception.

6th District Court.

Exception and answer.—Filed March 27th, 1867.

THOMAS H. MURPHY
vs.
SAMUEL AND LOUIS FASNACHT. } No. 19649

Defendants in this suit come into court, by their undersigned attorney, and except to plaintiff's petition, and say that they or either of them are not bound to answer the same, because no legal service of said petition was ever made on these defendants or either of them, or any person authorized to accept service for them or either of them; and they further aver that the deputy sheriff appointed to serve copies of the petition and citation of this suit, insisted on leaving the
101 same at the brewery of A. Erath & Co., corner of Poeyfarre and Anunciation streets although distinctly informed that these defendants did not reside there, but were domiciliated in the parish of Plaquemines, and although the person on the premises, and whom the deputy sheriff offered to serve the same, refused to receive said copies of petition and citation.

The defendants further plead, as a peremptory exception of law, that they reside and are domiciliated in the parish of Plaquemines, and that they are not amenable to the jurisdiction of this court; and they further aver that they are protected by Art. 162, C. P., and the act of 19th March, 1861, amending the same, in the enjoyment of the rights of being sued before the judge having jurisdiction over the place of their domicil or residence, and that they cannot, in the present case be sued elsewhere.

102 Wherefore they pray that plaintiff's petition be dismissed.

Should the foregoing exceptions be overruled, then these respondents reserve to themselves the benefit thereof, and all other legal exceptions; and for answer to plaintiff's petition, they deny, generally and specially, all the allegations therein contained tending to charge them or either of them with being indebted to said plaintiff, and pray that this petition be dismissed, and for general relief, &c.

(Signed) G. SCHMIDT,
Attorney of Defendant.

Sheriff's return on rule.—Filed April 3d, 1867.

Received March 28th, 1867. On the 2d day of April, 1867, served copy of the within rule on Thomas H. Murphy, plaintiff herein, at his domicil, No. 789 Magazine street, by leaving the same into the hands of Mrs. Murphy, a person apparently above the age of
103 fourteen years, living and residing at the said domicil, and whose name and other facts I learned by interrogating her; the said Thomas H. Murphy being absent at the time of said service; and returned same day.

(Signed) JOHN HECTOR, *Deputy Sheriff.*

Order continuing rule and fixing exception.

Minutes, April 5th, 1867:

The regular hour having expired, it is ordered, that the rule herein taken be continued till Saturday, the 13th instant, at 10 a. m.; and on motion of defendant's counsel, it is ordered, that the exception contained in their answer be fixed for same day.

Order continuing rule and exception.

Minutes, April 13th, 1867:

The rule and exception in this case were, on motion of
104 counsel, ordered to be continued to Monday next for trial.

Order continuing rule and exception.

Minutes, April 15th, 1867:

It is ordered by the court, upon motion of counsel for defendants, that the rule and exceptions herein be fixed for hearing on the 1st of May next, at 11 a. m.

Order continuing rule and exception.

105 Minutes, May 1st, 1867:

The rule hour having expired, it is ordered that the rule and exception in the case of Murphy vs. Fasnacht be continued to Monday next, 6th instant, at 11 o'clock a. m.

In Sixth District Court.

Note of evidence.—Filed May 6th, 1867.

MURPHY
vs.
S. AND L. FASNACHT. } No. 19469.

On rule to reinstate exception, G. Schmidt, esq., sworn, states:

I will state that I did not accept service of the notice of trial served on me. I was not authorized by my clients, who reside out of the parish, to accept service. I did not refuse to accept service, but did not really accept service.

Hearing of rule and exception and dismissal.

Minutes, May 6th, 1857:

The rule taken in this case, March 25th, and the exceptions herein filed on behalf of defendants, came up to-day; W. S. Benedict for plaintiff. G. Schmidt for defendants, when, after hearing pleadings and evidence, and arguments of counsel, and for the reasons assigned
in open court, it is ordered, adjudged and decreed, that the said
106 rule and exception to jurisdiction be dismissed, and upon the exception as to citation the court took time to consider.

Order of exceptions as to citation dismissed.

Minutes of May 10th, 1867.

In this case the court having duly considered pleadings, evidence, and the law applicable thereto, and by reason of the law and evidence being with plaintiff, it is adjudged and decreed that the defendants exception herein be dismissed with costs.

Sixth District Court.

Plea of prescription.—Filed December 2d, 1867.

THOMAS H. MURPHY *vs.* S'L AND L'S FASNACHT. } No. 19469.

The defendants in this suit plead as a peremptory exception of law, and as a perpetual bar to the present suit, the prescription of five years.

(Signed) G. SCHMIDT, *Attorney.*

In Sixth District Court, December 2d, 1867, on trial.

107 *Testimony.—Filed December 2d, 1867.*

MURPHY *vs.* FASNACHT. } No. 19469.

T. H. Murphy, sworn:

Is shown the two notes; says: I know the signature endorsed on these notes.

Cross-examined.

I am plaintiff in this suit. I am the agent; this suit should have commenced in name of Mrs. Westerfield, instead of T. H. Murphy. I am the real possessor of these notes. Deborah Westerfield resides in New York; saw her last in 1860. The endorsement, Deborah Westerfield, was written in 1862, in New York. It is the lady's handwriting. She is a relative of my wife. The Mr. Jackson
108 is a lawyer in New York; is the counsel for the succession; have never seen him write; have received letters of instructions from him, but have never seen him write. I was not in New York when Deborah Westerfield wrote this endorsement. In chief have attended to their business since 1861; am in correspondence every month, sometimes twice.

Plaintiff offers in evidence the two notes sued on, and the ac't of mortgagee.

Sixth District Court.

Bill of exceptions.—Filed December 2d, 1867.

THOMAS H. MURPHY
vs.
SAM'L AND LOUIS FASNACHT. } No. 19469.

Be it remembered that on the trial of this cause, defendants having filed the plea of prescription of five years to plaintiff's demand, (here insert the plea, see page,) offered to prove by Mr. A. Erath and Mr. Wild, witnesses then present in court, that when the
109 deputy sheriff presented himself with the petitions for defendants, and served them, as per his returns, on said A. Erath, the said Erath and Wild informed said deputy sheriff that neither Samuel or Louis Fasnacht did any longer reside in New Orleans, but were domiciliated in the parish of Plaquemines, and had resided there for several months previous, which evidence defendants offered to sustain. Their plea of prescription shows that they had not been duly cited, to the admission of which plaintiff objected. The court, being of the opinion that the facts offered to be proved had already been tried and disposed of on a previous trial, excluded the evidence, to which ruling defendants except.

(Signed) G. DUPLANTIER, *Judge.*

Sixth District Court.

Bill of exceptions.—Filed December 2d, 1866.

110 THOMAS H. MURPHY
vs.
S. AND L. FASNACHT. } No. 19469.

Be it remembered that before going into the trial of the merits of this cause, and to sustain the plea to the jurisdiction of the court, which the defendants insisted should be tried previous to the merits, they, the said defendants, offered to prove by witnesses duly summoned and then attending in court, that the defendants did at the time of the institution of the present suit, and for many months previous, reside permanently and were domiciliated in the parish of Plaquemines, and that they never intended to waive the rights to be sued at their domicil; to the admission of which evidence plaintiff by his counsel objected, on the ground that the plea to jurisdiction had been once fixed and dismissed, and the court had refused to
111 reinstate the same, which objections the court sustained and excluded the evidence, to which ruling defendants except. and pray that this their bill of exceptions be signed, which is done accordingly.

Be it also remembered that on the same occasion, and before going into trial on the merits, the defendants, in support of their exception that they had never been duly cited, offered to prove that

the petitions and citations in this suit were left at the residence of Erath & Co. on Poeyfarre street, New Orleans, and that the occupants of the premises told the deputy sheriff charged with the service of said petitions and citations, that defendants did not reside in the city of New Orleans, but had resided and been domiciliated for many months previous, and did then reside and were domiciliated in the parish of Plaquemines, and that there was no person on the
112 premises authorized to act for defendants; but that notwithstanding said explanation, and the positive refusal of the occupants of said premises to take charge of said petitions and citations, the deputy sheriff, pretending that he had received instructions to leave said petitions and citations on the premises, left them there, to the admission of which evidence the plaintiffs objected on the ground—

Which objections the court sustained and excluded the evidence, to which ruling of the court defendants except, and pray that this their bill of exceptions be signed, which is done accordingly.

By the Court:

The court this day refused to sustain the defendants exceptions and to hear witnesses in support thereof, on the ground that they have been previously tried regularly and dismissed.

113 (Signed) G. DUPLANTIER, *Judge.*

Judgment, rendered December 2d, 1867.

This cause came up to day for trial, Hornor & Benedict for plaintiff, G. Schmidt for defendants; when after hearing pleadings, evidence and counsel, for the reasons assigned in open court, it is adjudged and decreed that the plea of prescription this day filed be overruled. It is further ordered, adjudged, and decreed that there be judgment in favor of plaintiff, Thomas H. Murphy, and against the defendants, Samuel and Louis Fasnacht, for the sum of twenty-eight hundred and thirty-three and 33⅓-100 dollars, with seven per cent. per annum interest from the 17th of March, 1860, to the 17th of March, 1862, and eight per cent. thereafter until
114 paid; three 50-100 dollars costs of copy of act and costs of suit, with privilege and mortgage on the property described in plaintiff's petition.

Sixth District Court.

Rule for new trial.—Filed December 5th, 1867.

THOMAS H. MURPHY
vs.
SAMUEL AND LEWIS FASNACHT. } No. 19469.

On motion of G. Schmidt, attorney for defendants, ordered that plaintiff show cause on Monday, the 16th day of December, 1867,

at 10 o'clock a. m., why a new trial should not be granted them in this cause on the following grounds, to wit:

First, because contrary to law in this: That it appears from the service of the citations and petitions in the cause that defendants were served at their late residence by order of one of the attorneys of plaintiff, Mr. Benedict, and that the return shows that the
115 sheriff's officer was informed of many facts which de does not state, from which it is fair to infer that sheriff was told that defendants were not domiciliated in New Orleans.

2nd. Because the court erred in excluding evidence to prove that defendants resided at the time of the institution of the suit in the parish of Plaquemines, and were not amenable to the jurisdiction of the court, as well as excluding to prove that defendants had not been duly cited.

3d. Because the court disposed prematurely of the exceptions preceding the answer, without allowing defendants an opportunity of offering testimony, and excepting to the refusal of the court to receive the same as per annexed affidavit "A."

Secondly, because contrary to evidence in this: That there is not sufficient testimony to shew that plaintiff is the legal holder
116 of the notes, or authorized to institute this suit.

Sixth District Court.

Affidavit.—Filed December 5th, 1867.

THOMAS H. MURPHY
vs.
SAM'L AND L. FASNACHT. } No. 19469.

G. Schmidt, attorney of defendants in this suit, declares that on the 6th of May last, when this cause was fixed for trial, defendants had two witnesses in attendance for the purpose of proving the facts set forth in the exceptions preceding the answer in the cause; that on that occasion plaintiff objected to defendants, proving the residence of defendants, because the exceptions to the jurisdiction had once been fixed and dismissed, which objection the court sustained, but reserved the question whether the defendants had been properly cited for future consideration when the cause should be tried
117 on its merits; that relying on this his understanding of the decision of the court, he has had the same witnesses summoned and in attendance on the court every time the cause has been fixed for trial, with a view to establish the facts set forth in the exception, and except to the ruling of the court should it refuse to receive the evidence; for which purpose he, immediately after the sixth of May last, prepared the two bills of exceptions filed before his plea of prescription, so as not delay the court should it exclude defendants' evidence. He further declares that he did not know till Monday, the 2nd instant, on the trial of the cause, when it was brought to his notice by plaintiff's attorney, that the court had on

the 10th of May last finally disposed of the exceptions preceding defendant's answer; that he understood the court correctly, and that the exceptions were inadvertently disposed of without
118 his knowledge, and without affording defendants an opportunity of proving the facts, or to reverse their bill of exceptions to the ruling of court.

(Signed) G. SCHMIDT.

Sworn to and subscribed before me on the 5th of December, 1867.

(Signed) F. J. LAIZER, *D'y Clerk.*

Return on rule.—Filed December 11th, 1867.—*Received December 5th,* 1867.

On the 7th day of December, 1867, served copy of the within rule for a new trial, personally, on defendant, T. H. Murphy, plaintiff herein, at his store, No. 114 New Levee street, and returned same day.

(Signed) JOHN HECTOR, *Deputy Clerk.*

Hearing and continuing.

119

THOMAS H. MURPHY
vs.
S. AND L. FASNACHT. } No. 19469.

Minutes, December 5th, 1867:

The rule herein taken came on to day, G. Schmidt for plaintiffs in rule, W. S. Benedict for defendant in rule; when after hearing pleadings and counsel, and the rule hour expiring, it is ordered that the same be continued until to-morrow morning at 10 a. m. for further hearing.

Hearing and submission.

THOMAS H. MURPHY
vs.
S. AND L. FASNACHT. } No. 19,469.

Minutes, December 17th, 1867:

The rule herein taken for a new trial came on again to day, G. Schmidt for plaintiffs in rule, W. S. Benedict for defendant
120 in rule; when, after hearing pleadings and arguments of counsel, the same was submitted.

Opinion of court.—Filed December 24th, 1867.

MURPHY
vs.
S. AND L. FASNACHT.

It is quite questionable whether the proceedings had in this case are not liable to many serious objections. The defendants were either domiciliated in the parish of St. Bernard, or else were residents of the parish of Orleans. Upon the first hypothesis, they should have been sued in the parish of St. Bernard. Upon the second, the citation issued against them should have been served upon them personally, or left at their usual place of domicil. When a citation is not personal, there is but one place where it can be made legally, and that is the actual, and not the late, residence
121 of the defendant at the time of the service.

Let the rule for a new trial herein be made absolute.

Order for a new trial.

THOS. H. MURPHY
vs.
S. & L. FASNACHT. } No. 19469.

Minutes December 24th, 1867.

For the reasons assigned in the within opinion of the court this day delivered and filed herein, it is adjudged and decreed, that the rule taken for a new trial herein be made absolute, and a new trial granted in this case.

Order of discontinuance.

THOMAS H. MURPHY
vs.
S. & L. FASNACHT. } No. 19469.

Minutes of January 23d, 1868:

On motion of Hornor & Benedict, attornies for plaintiff, ordered that this suit be discontinued at plaintiff's cost, without
122 predjudice.

Clerk's certificate.

I, William Woelper, clerk of the Sixth District Court of New Orleans, do hereby certify that the above and foregoing fifty-five pages contain a full and correct transcript of all proceedings had, documents filed, and evidence adduced on the trial of the cause wherein Thomas H. Murphy is plaintiff, and Samuel and Louis Fasnacht are defendants, known and numbered on the docket of said court as No. 19,469.

In testimony whereof I have hereunto set my hand and affixed the impress of the seals of this court, on this the fourth day of February, in the year of our Lord one thousand eight hundred and sixty-eight, and the ninety-second year of the independence of the United States of America.

123 [SEAL.] (Signed) WM. WOELPER, *Clerk.*

Certificate of judge.

I, Guy Duplantier, sole judge of the sixth District Court of New Orleans, do hereby certify that William Woelper is clerk of the said court, and that the signature, Wm. Woelper, to the foregoing certificate is in the proper handwriting of him, the said clerk; to his official acts as such full faith and credit are due and owing; and I do further certify, that his attestation is in due form of law.

Given under my hand and seal, at the city of New Orleans, on this fourth day of February, in the year of our Lord one thousand eight hundred and sixty-eight.

124 (Signed) G. DUPLANTIER, *Judge.*

Clerk's certificate.

I, William Woelper, clerk of the Sixth District Court of New Orleans, do hereby certify that the Honorable G. Duplantier, whose name is signed to the foregoing certificate, is the sole judge of this court, and that he is duly commissioned and qualified. I do further certify that said court is a court of record.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at the city of New Orleans, on this fourth day of February, in the year of our Lord one thousand eight hundred and sixty-eight, and in the ninety-second year of the independence of the United States of America.

125 [SEAL.] (Signed) WM. WOELPER, *Clerk.*

Order.—Pleas fixed for trial.

Extract from the minutes, November term, 1867:

NEW ORLEANS, *Friday, February 21st*, 1868.

Court met pursuant to adjournment.

Present: Hon. E. H. Durell, district judge.

P. A. H. JACKSON *et als.*
vs.
S. & L. FASNACHT. } No. 5401.

On motion of Hornor and Benedict, attorneys for plaintiffs, ordered that the exception filed by the defendants be fixed for trial on Friday, 28th instant, at 11, a. m., and that the defendants be notified hereof.

Circuit Court of the United States for the fifth judicial cir-
126 cuit and district of Louisiana.

Notice of trial of pleas.

P. A. H. JACKSON *et als.*
vs.
S. & L. FASNACHT. } No. 5401.

You are hereby notified, that the exception filed in this case is assigned for trial for Friday the 28th day of February, 1868 A. D., at 11 o'clock, a. m.

By order of court.

Witness my hand and seal of the said court, at New Orleans, this 21st day of February, A. D. 1868.

(Signed) F. B. VINOT,
D'y Clerk.

To G. Schmidt, esq.

Marshal's sale.

Received February 24th, 1868, by the U. S. marshal, and on same day of February, 1868, served copy of within notice on G. Schmidt, named herein, in the hands of M. E. Livandais, at office 57 Royal street, in this city.

127 New Orleans, February 24th, 1868.

(Signed) S. W. REED,
D'y U. S. Marshal.

United States Circuit Court district of Louisiana.

Note of evidence.—Filed February 28th, 1868.

P. A. H. JACKSON *et als.*
vs.
S. & L. FASNACHT. } No. 5401.

Defendants offered suit No. 19,469, of sixth District Court of New Orleans, "transcribed at page 72;" also suit No. 11,058 of sixth court of New Orleans, "transcribed at page 28."

Order.—Exception overruled.

P. A. H. JACKSON *et als.*
vs.
S. & L. FASNACHT. } No. 5401.

Extract from the minutes of Friday, February 28th, 1868:

The exception filed by the defendants came up for trial;
128 Hornor and Benedict for plaintiffs, G. Schmidt for exceptors; when after hearing the pleadings and counsel, ordered that said exception be overruled with costs.

Judgment by default.

P. A. H. JACKSON *et als.*
vs.
S. & L. FASNACHT. } No. 5401.

Extract from the minutes of Saturday, February 29th, 1868:

On motion of Hornor & Benedict, attorneys for plaintiff, and on showing to the court that defendants have failed to answer although duly cited, ordered that judgment by default be entered against them.

Default set aside.

P. A. H. JACKSON *et als.*
vs.
S. & L. FASNACHT. } No. 5401.

Extract from the minutes of Tuesday, March 3d, 1868:

129 On motion of G. Schmidt, attorney for defendants, and on filing answer, ordered that the judgment by default, herein entered on 29th ultimo, be set aside.

Circuit Court of the United States, 5th judicial circuit, district of Louisiana.

Answer.—Filed March 3d, 1868.

PETER A. JACKSON *et als.*
vs.
SAMUEL AND LOUIS FASNACHT. } No. 5401.

The defendants in this suit come into court by their undersigned attorney, and reserve to themselves the benefit of the exceptions already taken and of all other legal exceptions, and for answer to plaintiff's petition, they say:

1°. That they admit their signatures to the notes sued on.

2°. They deny that plaintiffs are the holders and owners of the two notes on which this suit is brought, and they have reasons for believing that one Thomas H. Murphy, a citizen and resident
130 of New Orleans, and State of Louisiana, is the holder and owner of said notes, which they accordingly aver, alledging that if said Murphy, who had long previous to the institution of the present suit, brought suits in the sixth District Court of New Orleans, as owner of said notes, has transferred them to plaintiffs, such transfer is merely colorable and made for the purpose of giving this honorable court jurisdiction of the cause, contrary to the true intent and meaning of the act of Congress applicable to the case, and the true intent and meaning of the law giving this honorable court jurisdiction of similar controversies.

3°. Defendants plead the prescription of five years as a perpetual bar to the right of plaintiffs to recover any portion of their demand in this suit.

4°. Finally denying that plaintiffs have any right to sue
131 them or obtain a judgment against them in this suit, they pray to be hence dismissed with costs, and for generol relief, &c.

(Signed) G. SCHMIDT, *Attorney.*

United States Circuit Court.

Affidavit for commission.—Filed March 11th, 1868.

P. A. H. JACKSON & ALS., *vs.* S. & L. FASNACHT. } No. 5401.

Joseph P. Hornor being sworn, says: He is one of plaintiffs' attorneys, that said plaintiffs reside out of and are absent from this State, that the testimony of Peter A. H. Jackson and Deborah A. Westerfield is material and necessary to enable them to make out their case; that said witnesses reside in the city and State of New York, and it is necessary their testimony be taken under commission.

(Signed) JOSEPH P. HORNOR.

132 Sworn to and subscribed before me this 11th day of March, 1868.

(Signed) D. URBAN, *U. S. Comm'r.*

Additional affidavit for commission.—Filed March 18th, 1868.

Thomas H. Murphy being sworn, says he is agent for plaintiffs, who reside out of the State of Louisiana and are absent threfrom; that the testimony of Peter A. H. Jackson and Deborah A. Westerfield is material and necessary to enable them to make out their case; that said witnesses reside in the city and State of New York, and it is necessary to take their testimony under commission.

(Signed) THOS. H. MURPHY.

Sworn to and subscribed before this 18th March, 1868.

(Signed) F. B. VINOT, *D'y Clerk.*

Order for commission.

133 P. A. H. JACKSON & ALS. *vs.* S. & L. FASNACHT. } No. 5401.

Extract from the minutes of Wednesday, March 11th, 1868:

On motion of Horner and Benedict, attorneys for plaintiff, and on filing affidavit, ordered that a commission do issue herein, directed to any United States or Louisiana commissioner at New York city, to take testimony of witnesses named in the said affidavit, and that a delay of 30 days be allowed for the return of the same.

United States Circuit Court.

Interrogatories for plaintiff.—Filed March 11th, 1868.

PETER A. H. JACKSON ET AL.
vs.
SAMUEL & LEWIS FASNACHT. } No. 5401.

Interrogatories to be propounded to and answered under oath by Peter A. H. Jackson and Deborah A. Westerfield, wife of Cornelius Westerfield, witnesses to be examined on behalf of plaintiff,
134 under and by virtue of the annexed commission.

1°. What is your business, age, residence, and of what state a citizen?

2°. Do you know the parties to this suit; if aye, of what State are they citizens?

3°. Do you know Thomas H. Murphy of the city of New Orleans; Have you had any business transactions with him?

4°. Look at the two notes hereto annexed and state what you know relative to the same. Who is the owner or owners thereof? In whose handwriting are the indorsements on said notes? For what purpose were such indorsements made? To whom were said notes sent after said indorsements? What instructions, if any, were given relative to the collection of said notes and to whom?

5°. Has payment ever been made to you on said notes?

6°. State anything further you may know relative to this
135 suit which would be of advantage to plaintiff, the same as if thereto specially interrogated.

(Signed) HORNER & BENEDICT,
Plaintiff's Attorney.

United States Circuit Court, district of Louisiana.

Notice to cross-interrogatories.

PETER A. H. JACKSON ET ALS.
vs.
SAMUEL & LEWIS FASNACHT. } No. 5401.

To G. Schmidt, esq., attorney for defendants:

Take notice that the plaintiffs have this day filed interrogatories to certain witnesses, copy whereof accompanies this notice, and that you may, if you think proper, put such cross-interrogatories as are requisite and fit, and file the same in this court within three days from the service hereof.

Clerk's office, New Orleans, March 11th, 1868.

[SEAL.] (Signed) F. B. VINOT,
D'y Clerk.

Marshal's return.

136 Received March 12th, 1868, by the U. S. marshal, and on same day of March, 1868, served a copy of within notice, interrogatories accompanying same, on G. Schmidt, attorney named herein, personally at office 57 Royal street, in this city.

New Orleans, March 14th, 1868.

(Signed) S. W. REED,
D'y U. S. Marshal.

United States Circuit Court.

Cross-interrogatories.—Filed March 14th, 1868.

PETER A. H. JACKSON ET AL.
vs.
SAMUEL & LOUIS FASNACHT. } No. 5401.

The defendants in this suit, reserving to themselves all legal exceptions to the annexed interrogatories, require answers to the following cross-interrogatories:

1st. Did you or either of you ever reside in the State of Louisiana, and for what length of time?

137 2° Where were you born?

3° Is it to your knowledge that Thomas H. Murphy brought a suit in his own name, and declaring himself owner of the two notes annexed in 1864. Did he inform you of the fact, and did it receive your sanction?

4th. Do you know that in 1867, after having been defeated in the first suit, he brought a second suit on the same notes, in which he represented himself as the owner of the same, and which suit he had since discontinued to bring the present suit.

5th. Have you corresponded with said Murphy in relation to these two notes, if so, annex all the letters you have received from him and copies of your answers.

(Signed) G. SCHMIDT,
Attorney of Deft's.

Commission for plaintiff issued March 17th, 1868, and testimony
138 *taken under commission returned and filed April 6, 1867.—Plaintiff's commission.*

United States Circuit Court.

PETER A. H. JACKSON & *al.*
vs.
SAMUEL & LOUIS FASNACHT. } No. 5401.

Circuit Court of the United States, for the fifth judicial circuit, holding session in and for the district of Louisiana, to any United States or Louisiana commissioner at New York city.

Know ye, that reposing special trust, and confidence in your integtity and ability we hereby authorize and require you that you call

and cause to come before you, Peter A. H. Jackson and Deborah A. Westerfield, wife of Cornelius Westerfield, witnesses, and them duly examine on the annexed interrogatories on oath touching and concerning certain matters and things in a case now depending
139 in the said court, wherein Peter A. H. Jackson et al. are plaintiffs, and Samuel and Louis Fasnacht are defendants, and the same examinations so taken and reduced to writing you certify under your hand and seal, and send enclosed to this court without delay, to be read in evidence on the trial of said cause, and send also this writ.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States at the city of New Orleans, this 17th day of March, anno Domini, 1868, and the 92d year of the independence of the United States of America.

[SEAL.] (Signed) D. URBAN, *Clerk*,
By F. B. VINOT, *D'y Clerk*.

U. S. Circuit Court.

Interrogatories-in-chief.

140 PETER A. H. JACKSON *et al.*
vs.
SAM'L & LOUIS FASNACHT.

Interrogatories to be propounded to and answered under oath by Peter A. H. Jackson and Deborah A. Westerfield, wife of Cornelius Westerfield, witnesses, to be examined on behalf of plaintiff, under and by virtue of the annexed commission.

1st What is your business, age, residence, and of what State a citizen?

2d. Do you know the parties to this suit? If yea, of what State are they citizens?

3d. Do you know Thomas H. Murphy, of the city of New Orleans. Have you had any business transactions with him?

4th. Look at the two notes hereto annexed, and state what you know relative to the same. Who is the owner or owners thereof? In whose handwriting are t he idnorsements on said notes? For
141 what purposes were such indorsements made? To whom were said notes sent after said indorsemer ts? What instructions if, any, were given relative to the collection of said notes, and to whom?

5th. Has payment ever been made to you on said notes?

6th. State anything further you may know relative to this suit which would be of advantage to plaintiff, the same as if thereto specially interrogated.

(Signed) HORNER & BENEDICT,
Plaintiffs Attorneys.

Cross-interrogatories.

The defendants in this suit, reserving to themselves all legal exceptions to the annexed interrogatories, require answers to the following cross-interrogatories.

1st. Did you or either of you ever reside in the State of Louisiana, and for what length of time.

2d. Where were you born?

142 3d. Is it to your knowledge that Thomas H. Murphy brought a suit in his own name, and declaring himself owner of the two notes annexed, in 1864? Did he inform you of the fact, and did it receive your sanction?

4th. Do you not know that in 1867, after having been defeated in the first suit, he brought a second suit on the same notes, in which he represented himself as the owner of the same, and which suit he has since discontinued to bring the present suit?

5th. Have you corresponded with said Murphy in relation to these two notes. If so, annex all the letters you have received from him and copies of your answer.

(Signed) G. SCHMIDT,
Attorney of Defendants.

CLERK'S OFFICE.

True copies of the originals on file.
New Orleans, March 14th, 1868.
[SEAL.] (Signed) D. URBAN, *Clerk*,
By F. B. VINOT, *D'y Clerk.*

143 Note marked T, annexed to foregoing interrogatories "transcribed at page 6."

Note marked H, annexed to foregoing interrogatories, transcribed at page 7.

Testimony taken under commission.

Depositions of witnesses produced, sworn and examined on the day hereinafter stated, at my office No. 3 John street, in the city of New York, under and by virtue of the annexed commission issued out of the Circuit Court of the United States for the 5th judicial circuit, holding sessions in and for the district of Louisiana, to take depositions in a certain cause pending and at issue between Peter A. H. Jackson et al., plaintiffs, and Samuel and Louis Fasnacht, defendants.

Deborah A. Westerfield, wife of Cornelius Westerfield, who being first duly sworn on the Holy Bible, on this the 26th day of March,
144 in the year of our Lord, 1868, doth depose and say as follows.

First. To the first interrogatory to wit: What is your business, age, residence, and of what State a citizen? She saith:

Answer. I am sixty-nine years of age, on the second October, 1867. I reside in the city of New York, and am a citizen of the State of New York.

Second. To the second interrogatory: Do you know the parties to this suit? If yea, of what State are they citizens? She saith:

Answer. I know the parties to this suit, the plaintiffs are citizens of the State of New York; the defendants, I have always understood, were citizens of the State of Louisiana.

Third. To the third interrogatory to wit: Do yo know Thomas H. Murphy, of the city of New Orleans? Have youu had any bus-
145 iness transactions with him? She says:

Answer. I know Thomas H. Murphy, of New Orleans. I have employed him to collect rents and other moneys due to me in New Orleans.

Fourth. To the fourth interrogatory, to wit: Look at the two notes hereto annexed, and state what you know relative to the same. Who is the owner or owners thereof? In whose handwriting are the endorsements on said notes? For what purposes were such endorsements made? To whom were said notes sent after said endorsements? What instructions, if any, were given relative to the collection of said notes, and to whom? She saith:

Answer. I have examined the two notes annexed to the commission. They were given by the defendants to Peter A. H. Jackson and myself for real estate sold by us, through me, to the defendants, in part payment of the same. They still belong to Mr. Jack-
146 son and myself. The endorsement, Peter A. H. Jackson, D. A. Westerfield, are in our handwriting respectively, and they were so endorsed for greater safety in transmitting them to New Orleans for collection by Mr. Murphy. The notes were then sent for collection to Mr. Murphy, with instructions to collect the same, and remit the money to us.

Fifth. To the fifth interrogatory, to wit: Was payment ever made to you on said notes? She saith:

Answer. These notes have never been paid to my knowledge or belief.

Sixth. To the sixth interrogatory, to wit: State anything further you may know relative to this suit which would be of advantage to plaintiffs, the same as if specially interrogated. She saith:

Answer. I did not know until recently in what manner the suits to collect the notes were commenced.

(Signed) D. A. WESTERFIELD.

147 *Cross-examination.*

First. To the first cross-interrogatory, to wit: Did you, or either of you, ever reside in the State of Louisiana, and for what length of time? She saith:

Answer. I have always resided in the State of New York, except for six years, about twenty-seven years ago, when I resided in the city of New Orleans.

Second. To the second cross-interrogatory, to wit: Where were you born? She saith:

Answer. I was born in the city of New York in the State of New York.

To the third cross-interrogatory, to wit: Is it to your knowledge that Thomas H. Murphy brought a suit in his own name, and declaring himself owner of the two notes annexed in 1864? Did he inform you of the fact, and did it receive your sanction? She saith:

Answer. I did know until recently that suits had been
148 brought in the name of Thomas H. Murphy on these notes.

Fifth. To the fourth cross-interrogatory, to wit: Do you not know that in 1867, after having been defeated in this first suit, he brought a second suit on the same notes, in which he represented himself as the owner of the same, and which suit he has since discontinued to bring the present suit? She saith:

Answer. I did not know either of the first or second suit having been brought in the name of Thomas H. Murphy.

To the fifth cross-interrogatory, to wit: Have you corresponded with said Murphy in relation to these notes? If so, annex all the letters you have received from him, and copies of your answer. She saith:

Answer. I have written several letters to the said Murphy
149 about the great delay in collecting these notes, but I do not keep a letter-book, and have no copy of these letters. I have received a number of letters from the said Murphy about these notes, and I annex all of them which I can find.

(Signed) D. A. WESTERFIELD.

Sworn to and subscribed to before me this the 26th day of March, in the year 1868.

[SEAL.] (Signed) HENRY C. BANKS,
Commissioner for Louisiana, No. 3 John street, New York city.

Letter No. 1 annexed to foregoing deposition.

NEW ORLEANS, *Nov'r 10th*, 1865.

DEAR AUNT: Yours dated October 23d has arrived. I mailed you a letter on the 17th of October, with receipts and money, and gave you an account of your business, how property is raising; the
150 city is crowded and are houses scarce. I am in hopes that some one will complete the iron house, which occupies a whole block. This is opposite your house, and when it is finished you will have a fine chance to sell at a very high figure. I have collected $200 for the month of November, and have finished the upper gallery floor: it cost $175.

Enclosed you will find the receipt, and one hundred and eighty-five dollars and thirty-five cents. I have seen my counsel about the notes, and asked them when they thought the case would come off: they could not tell; there were so many cases ahead of mine, and the court is so slow, that it will try the patience of any one that has any cases in it. If you want me to take the notes out of court and send them to you, please give instructions and I will get them, and send

them on; perhaps if I should offer them for sale, Fasnacht
151 might came forward and pay them. I might advertise for sale and publish their names and the property that the notes are due on.

Please see what you could get some wall paper at. I have the amount secured, but I want first to know the price for white with gilt stripes and paper columns. I am sorry you have so much trouble with Peter. I will make some inquiry about what I can get for your house. How is uncle? If he is cured of erysipelas, well; if not, the best thing to do is to keep it open, and mercurial ointment is what cured me. I watched my case day and night for 4 months. Mary's health is good, and so is my aunt Louise. Mac and Irwin are all well. Louis is in business with me. Remember us to all enquiring friends. Mary joins me in much love to you al.

(Signed) T. H. MURPHY.

152 Please call and tell me what you think we had best do.

(Signed D. A. WESTERFIELD.

Please return this letter.

Letter No. 2 annexed to foregoing deposition.

NEW ORLEANS, *May 22d*, 1865.

DEAR AUNT: Yours, dated 6th instant, is at hand. I would have written sooner if I could have paid the taxes, or had any news to communicate. I have paid for the insurance policy $75 50, and the U. S. tax, $32 90; the State tax, $58 35; the city taxes are now 1½ per cent., making $90 00 more than it was last year. I have paid $270 00 for city taxes; all of the receipts you will find enclosed with this letter, with six dollars and twenty-five cents in greenbacks. This squares our account up to the first of May, 1865. There are so many cases in the Supreme Court filed before yours is the reason of its delay. My counsel tells he hopes it will decide your case very soon. Exercise your patience a little longer. If the notes had
153 been here sooner, and filed in court, they would have been called sooner. The notes are safe, and you need not be anxious about them; it will be a relief to me when they are paid, and you get the money. I feel as anxious as any person to have them paid.

We are all well. Mary has just recovered from a very serious illness. Mary and family join me in much love, and mention to you and Mrs. Champlin, and Amie Urct, and all our friends.

Affectionately,

(Signed) THS. H. MURPHY.

Letter No. 3 annexed to foregoing deposition.

NEW ORLEANS, *June 8th*, 1866.

Mrs. D. A. Westerfield:

DEAR AUNT: Yours to Mary, dated May 18th, came on the 3d. I deferred writing to learn when the case of Fasnacht would
154 come off again. He demanded another trial and the court granted it. I do not know the reason, but think it, the suit, was entered wrong. The notes are in the best of hands. Messrs. Durant and Hornor holds them. They are honest and wealthy lawyers. They had the notes of Pepin. They are above suspicion; so be not uneasy about them. I cannot say when the trial will come off. Mr. Hornor told it would not be long. The taxes are due, but I have not money enough to pay them now. I have collected the money for June. I will retain seventy-five dollars to pay the taxes on the first of July, and sent you one hundred and fifty dollars. My patent case will come off on the 27th of this month. The iron block looks beautiful under its white coat of paint. It will be the finest and largest building in the city. They are working on it every day. It has a noble pavement all around it, that will last, it appears,
155 for ages. I have commenced my business again. The summer months are the busy ones with me. It is very healthy here. Mary looks well; the children have recovered and well too. Aunt Harriet enjoys good health. My health was never better. We all join in much love to you and family.

(Signed) T. H. MURPHY.

Letter No. 4 annexed to foregoing deposition.

NEW ORLEANS, *May 6th*, 1867.

Mrs. D. A. Westerfield:

DEAR AUNT: The note case came off to-day and was continued two weeks. I think from the remarks of the judge, Duplantier, it will be finally settled then; his mind is made up on the case, to my judgment. The case will be tried on its merits. The time has been taken up with rules that the defence has taken up against the proceedure of the case. We all join in much love.

156 Affectionately yours,

(Signed T. H. MURPHY, *Box* 598.

Letter No. 5 annexed to foregoing deposition.

NEW ORLEANS, *Nov. 17th*, 1865.

DEAR AUNT: I have received yours dated Nov'r 2d, in reply to mine of Oct'r 16th. I mailed you one dated Nov'r 10th, with a remittance. I have had an interview with my counsel concerning those notes. He showed me a catalogue of cases in the Supreme Court, 540. Your case was 150 off: that is, there are 149 to be tried, then yours will come up. The court calls, on an average, 35 cases per week. I inquired of them, my counsellors, if I could sell

the notes, and they replied, No. They say I cannot take them out of court, although I could sell them for near the value, and so ease your mind with that case. We are all well, and [and] wish
157 to be kindly remembered to you and family. I will make enquiry and see what kind of an offer can be got for your property here; if favorable, will let you know; but my advise is to hold it one more year. Property is on the rise and a great deal is changing hands; a great many buildings are going up, and carpenters get $5 per day, and scarce at that, and lumber is high and scarce. Rents have advanced, and I will try to raise $25 on your house for next month.

Affectionately,

(Signed) THOMAS H. MURPHY.

Letter No. 6 annexed to foregoing deposition.

NEW ORLEANS, *May 9th*, 1863.

Mr. C. Westerfield:

Yours of the 9th inst. is at hand. I have received the registered letter with 2 notes of $2,000 each.

Respectfully yours,

(Signed) THOMAS H. MURPHY.

158 *Letter No. 7 annexed to foregoing deposition.*

NEW ORLEANS, *March 30th*, 1864.

DEAR AUNT: Yours of the 11th was duly received. I have prosecuted Pepin. Since this prosecution his agent called on me with two witnesses, and offered me the amount, with interest, to maturity. This I told the agent I had not authority to do. One of the gentlemen with him was his counsel. He desired me to explain, he thinking that I was the owner of the notes. I told him that I was only an agent, the holders of the notes lived in New York. This seemed to change his opinions. When they went out the lawyer had a talk with Pepin's agent, and the agent came back and told that after I had consulted my counsel and the owners of the notes, if they concluded to take the amount with interest to maturity that the money
159 would be ready for me at any time. I saw my counsel and stated the interview with the agent of Pepin; he said he was a fool. Pepin's counsel has appealed the judgment in the case to the Supreme Court, and that is not organized, and I cannot say when it will be, but think soon. The first of May I think is the time for Fasnacht trial to come off. The State and city tax collectors are out with advertisements that they are ready to receive the taxes for 1863. I have one month's rent on hand, and will retain it for paying the taxes of 1863, unless you write to the contrary. The wall is completed. I have not received any bills to pay as yet.

My health is improved. I have been out two weeks. The measles on my left cheek are not entirely relaxed; my jaws are still

160 prevented from being fully opened. I can only open my mouth ¾ of an inch. Mary and aunty and the children are all well.

Affectionately yours,

(Signed) T. H. MURPHY.

P. S. My counsel says that Bank's order will not affect the collection of these notes. Pepin's being in France will make no difference.

(Signed) T. H. M.

Letter No. 8 annexed to foregoing deposition.

NEW ORLEANS, *April 10th*, 1863.

DEAR AUNT: I mailed a letter for you, and one for Mr. Sandford, this morning; as the steamer was to leave to-day, the mail closed at 9 a. m. Miss Victoria De Bolle called on me to-day and paid the rent. Her mother came down stairs to-day for the first time and appeared very smart; one of her fingers the doctor had to break over again, and wants to break two more. She still has a
161 large hole in head. They are doing pretty well; have 20 boarders. I saw Mr. Pepin at 7 a. m. this morning. He said, after reading Mr. Sanford's note, that he would not pay the interest, for this reason; he says that he has witnesses to prove that he offered to pay the amount the notes came due to your agent, Mr. J. S. Maunsell when the note matured. He says he is ready to pay me as soon as I produce the notes, and asked me to name the time. I said about the first of May.

Messrs. Fasnacht said the same to me yesterday that they had offered Mr. Maunsel city money, and he declined to take. Now, dear aunt, this was in the year 1862, March 17th, in the reign of terror, one month before Butler and the U. S. troops arrived when
162 anybody would offer or receive any money to people of the north, it was death; these men run a great risk in offering the money, and as they done so and are willing to pay now without interest from 17th of March, 1862, I would advise you to settle with them and not add the interest from that time; send the notes to me with your instructions and I will collect the money without delay; I think U. S. currency, paper I mean, is better than the city bank notes, they are called on by the mortgage notes to pay city bank notes; and probably I may be able to purchase U. S. notes at 1 per cent. discount; they have been as low as five per cent. here below city bank notes, but all this is uncertain the market changes every week. Mary has a dreadful cough. I have a bad cold and the children all have the hooping cough. Aunt Harriet is well, and sends her love to you;
163 Mary, Louis and I join in love to you, uncle, aunt C. and Amie, Rachel, Harriet &c.; does your mocking bird live and sing?

Affectionately yours,

(Signed) THOS. H. MURPHY,

789 *Magazine st.*

P. S. I have written to Mr. Sanford.
(Signed) T. H. M.

Mary received a letter from Harriet and one from Julia.
(Signed) T. H. M.

7 o'clock p. m., Mr. Hanlon has presented his bill for repairs on the house and I have paid it, $130 dollars; enclosed you will find his bill receipted.
(Signed) T. H. M.

Letter No. 9 annexed to foregoing deposition.

NEW ORLEANS, *April 9th*, 1863.

DEAR AUNT: Yours of 19th and Mr. Sanford's of the 27th of March I received to day, with a bill of exchange calling for one hun-
164 dred dollars; I called Messrs. Fasnacht and he says that he offered Mr. Maunsell the money when it was due and he declined taking it, as he was not in possession of the note. Messrs. Fasnacht tells me he will pay the note as soon as I produce it, less the interest from the 17th of March, 1862, as he was ready to pay it then and could not; he will not pay to Mr. Smith or any one else without they have the note; this is their answer. I called no Mr. Pepin at his residence, but he was not at home. I will see him in the morning and send you his answer. Mrs. De Bolle is getting well; she does not use her limbs as much as she ought to do, so her doctor says. I think she will give up the idea of damages; her daughter called at my house on the first of this month and told Mary she would pay me on the 10th, that is to morrow, she excused
165 herself for not paying. I think it was mentioned in my letter of the 4th that the party was the Jackson R. Road Company, and that the property was seized by the government—U. S.; it will be a long time before the government will help to build the wall. I have tried several times to see the quartermaster but have failed. I will try again soon. I have all the repairs completed and will have the bill to-morrow. I write you this evening so as not to miss the first steamer. Mary and aunty and Louis join me in much love to you and friends.

Affectionately yours,
(Signed) T. H. MURPHY,
789 *Magazine street.*

To Mrs. Deborah A. Westerfield, No. 247, west 22nd street.

P. S. Please let Mr. Sanford know that you have Mr. Fasnacht's answer. I will write to Mr. Sanford as soon as hear from Mr. Pepin.
166 (Signed) T. H. M.

April 10th, '63. I have Mr. Pepin's answer; he has offered to pay the notes at maturity and he will pay me when I am ready to give him the note.

Letter No. 10 *annexed to foregoing deposition.*

NEW ORLEANS, *May 20th*, 1863.

Mrs. D. A. Westerfield:

DEAR AUNT: I have received Mr. Sanford's registered letter with 2 notes of $2,000 each. Messrs. Fasnacht wants one month from date to pay the notes with interest to maturity. I informed them that he would have to pay interest to date for he had failed to pay on presentation. They want you to hold the notes you have until 1864; they will pay me the interest to date, on the notes that you have. I have not seen Mr. Pepin lately, but I will see him in a day or so.
167 I have not received any letters from you since the 8th of April. Mrs. De Bolle goes out very often, she is quite well. I have collected 4th month's rent and have on hand $147 35 cts. I have not done anything about the wall. Mary is not well, neither is Lilly. I am quiet ill to day, but expect to be well in a day or two. Are you all well? Mary joins me in love to you.

Affectionately yours,

(Signed) THOMAS H. MURPHY.

Letter No. 11 *annexed to foregoing deposition.*

NEW ORLEANS, *August 14th*, 1863.

DEAR AUNT: Yours of July 25th is at hand, I am fully persuaded that Messrs. Fasnacht and Pepin will not pay interest nor principal until they are compelled to by a decision of the court. They flatter themselves that they have offered to pay Mr. Maunsell before
168 witnesses that they had advertised for a given time, for holders of the notes to come forward and receive their money (they well knew that the agent could not receive the money at the time the rebellion was in the city). Now I have reason to think the above parties symphathise with the rebels and they have consulted rebel lawyers, who have advised them not pay. I think you will find in my previous letter why they acted as they did. I think it all folly to call on Fasnacht; his design is not to pay until he is made to pay in court. The courts closed about that time and will not open for some time next month. It will be better to wait until the court commences and then bring them into court and prosecute them for principal and interest. I will see what it will cost and let you
169 know and who the parties are before I engage them. Mary was quite pleased to see her aunty looking so fresh and fair; the picture highly commends you as well as the artist that executed it. You remind me of the "Shells of the Ocean," "I thought I was again a child," Thomas thinks it is "pretty well" for sixty-three. We are all well except Lilly and she is filled with ailes. Mary and

family join me in love to you, uncle, aunty Champlin, Anna and her baby and all enquiring friends. Mary says kiss that baby a dozen times for her. O, how warm it is; we have been blest with a healthy summer, thank God. The southern church, if I may be allowed the expression, have been praying for an epidemic to destroy the Yankees; this is another confirmation that the prayers of the wicked never prevail, adieu.

Affectionately yours,

(Signed) THOMAS H. MURPHY,
789 *Magazine street*.

170 *Letter No.* 12 *annexed to foregoing deposition.*

NEW ORLEANS, *Jan'y* 21, '64.

DEAR AUNT: I received two letters from you, one dated the 5th instant, and one the 7th, with two notes, one for $2,000, with interest, and one for $833 33 cts. I was instructed by C. W. Sanford, your counsel, to deduct one per cent. for collecting the two first notes, which I did. I wrote a letter dated Dec'r 14, '63, and was about to mail it. I met Mr. Hornor, and told I was mailing a letter for you; and he told me to wait, that Fasnacht had promised to pay in greenbacks in a few days, so I waited. This letter gave an account of Mrs. De Bolle's rent. I have been ill for a long time, say 2 months, and am very feeble yet. I was not able to give you a balance sheet at the time, but I will do it as soon as able. The most of the greenbacks were in small bills, and they were at par, so I
171 called for checks to suit the amount of money on hand.

(Signed) T. H. MURPHY.

Letter No. 13 *annexed to foregoing deposition.*

NEW ORLEANS, *July 8th*, 1863.

DEAR AUNT: On the 18th of May the notes were presented to L. Fasnacht. His brother S. is not in the city. He requested me to wait until the 20th. I did so. He came on the 20th, and said he would have to make great sacrifices to pay the notes then, and wanted me to wait to the 20th of June; that he would pay the interest up to that time. I then told him he would have to interest to date, as he had failed to pay on presentation. On the 20th of June, the day appointed for him to pay, there was a great scare in the city in consequence of the confederates driving in the federals from the Lafourche country. It was rumored that 30,000
172 were 20 miles above the city. This news changed the mind of Fasnacht, and he had made up his mind not to pay from that time; so he sends his clerk to get the amount of interest. I made out a bill with interest to date. One week passed, and he did not appear, so I called on him. He received me with a look of wonder, and demanded in a gruff manner "What I wanted." I answered his pleasure concerning the notes. He said he was ready to pay the notes with interest to maturity. I answered I was ready

to receive the money, and give the notes on those conditions. He then said he would send the money down to me that day by his clerk. The clerk came, but paid no money. He came to tell me there was a policy of insurance that had been transferred to the holder of the notes; that I would have to get that and
173 acknowledge the payment of the notes on these policies, there being three of them. I went to the Sun Mutual Insurance Co., and they told he had not transferred any of the policies; so did the Citizens' Insurance Co. tell me the same. I argued the case with him, and showed him that the ground was worth the notes, and that was now a sufficient security. He then showed me a policy that had Mary's name and my name and others on it, that he had in his possession. Now, if you have such a policy in your possession send it on. Fasnacht made an engagement with me to meet at Mr. Maunsell's on the 6th of July. He did not fill the engagement. I called on him on the 8th to learn his excuse. He told me he was too busy. I then told him if he did not pay the notes that day I would
174 bring him into court, to pay interest to date. Mr. Maunsell tells me they never transferred any policy to him. Mr. Pepin says he will not pay the interest after maturity. You will have to foreclose the mortgage on him. Fasnacht has built a large factory on the place, and is able to pay if he pleases to do so. We are all well. Mary joins me in love to you and friends.

Affectionately yours,

(Signed) THOMAS H. MURPHY.

P. S. The reason why I offered to settle with him at maturity was this: There was a panic among the banks, their notes went down and greenbacks went up to 5 per cent., and as he had agreed to pay in greenbacks I thought it would be as well to take his offer. The courts are closed.

(Signed) T. H. M.

Letter No. 14 *annexed to foregoing deposition.*

NEW ORLEANS, *Feb'y* 19*th*, '64.

DEAR AUNT: I had to prosecute Fasnacht, and final judg-
175 ment was rendered against him; but they filed a petition of appeal. The judge granted a suspensive appeal with security, and has set the first Monday in May next for me to answer said appeal, or my attorney. Mr. Pepin is in France. I have seen his agent, and he said he would pay the notes if his counsel advised him to do so. He was to have called on me last Monday, but failed to keep his promise.

General Banks has issued an order to protect planters, and one case of notes failed in the same court on account of this order. I have hopes it will not be so in this case. The plaintiff in the case cited above had to pay costs. Fasnacht and Pepin both told me they had the money and wanted to pay the notes; all the objection they had was to pay interest after maturity.

I am still confined to my house. My strength returns, but
176 the accumulation of pus in my left side of head is the same, but not so painful. We are otherwise well.

I have not sued Pepin yet, but think it best to do so immediately, so the case may be tried in this term, for the courts will close in July, and then it will lay over for another year. Have you any more notes against Pepin? We had a snow storm yesterday; came down in northern style. It was one of sights for Creoles, and our children were out making snow balls. They had to gather it on the sheds, where it did not thaw. The ground was too warm; it melted as soon as it fell on it.

Mary and children join in love to you, and uncle and aunty C. and Anne, &c.

Affectionately yours,

(Signed) THOMAS H. MURPHY.

177 Peter A. Jackson, who being first duly sworn on the Holy Bible on this the day of March, in the year of our Lord 1868, doth depose and say as follows:

First. To the first interrogatory, to wit: What is your business, age, residence, and what of State a citizen? He saith:

Answer. I am engaged in the real estate business and in managing my own property in the city of New York. I am 55 years of age, and reside in the city of New York, and I am a citizen of the State of New York.

Second. To the second interrogatory, to wit: Do you know the parties to this suit; if yea, of what State are they citizens? He saith:

Answer. I know the defendants only by hearsay. I understand that they are citizens of Louisiana. I know Mrs. Westerfield, and she and myself are citizens of the State of New York.

178 Third. To the third interrogatory, to wit: Do you know Thomas H. Murphy of the city of New Orleans; have you had any business transactions with him? He saith:

Answer. I know Thomas H. Murphy, through Mrs. Westerfield only, and have no personal acquaintance with him. He has been employed by Mrs. Westerfield and myself to collect monies due to us in New Orleans; but the correspondence has been conducted by Mrs. Westerfield.

Fourth. To the fourth interrogatory, to wit: Look at the two notes hereto annexed and state what you know relative to the same? Who is the owner or owners thereof? In whose handwriting are the endorsements on said notes? For what purposes were such endorsements made? To whom were said notes sent after said endorsements? What instructions, if any, were given relative to the collection of
179 said notes, and to whom? He saith:

Answer. I have looked at the two notes annexed to the commission. They were given by defendants (as I was informed by Mrs. Westerfield, who transacted the business in New Orleans,) for real estate sold by her on her and my account to said defendants, in New Orleans, and in part-payment for the same. They still belong

to Mrs. Westerfield and myself. The endorsements, P. A. H. Jackson, and D. A. Westerfield, are in our handwriting and were so endorsed for greater safety in transmitting them to said Murphy at New Orleans, for collection on our account. He was to collect them and remit the proceeds to us.

Fifth. To the fifth interrogatory, to wit: Has payment ever been made to you on said notes? He saith:

Answer. These notes have never been paid to my knowledge,
180 information or belief.

Sixth. To the sixth interrogatory, to wit: State anything further that you may know relative to this suit, which would be of advantage to the plaintiffs the same as if thereto specially interrogated? He saith:

Answer. I did not know until very recently in what manner the suits had been prosecuted.

(Signed) PETER A. H. JACKSON.

Cross-examination.

First and second. To the first and second cross-interrogatories, to wit: Did you, or either of you ever reside in the State of Louisiana, and for what length of time? Where were you born? He saith:

Answer. I was born in the city of New York, and have always resided in the State of New York.

Third. To the third cross-interrogatory, to wit: Is it to your
181 knowledge that Thomas H. Murphy brought a suit in his own name, and declaring himself owner of the two notes annexed in 1864? Did he inform you of the fact, and did it receive your sanction? He saith:

Answer. I did not know nor was I informed that Thomas H. Murphy had prosecuted these notes in his own name until within a few days since.

Fourth. To the fourth-cross-interrogatory, to wit: Do you not know that in 1867, after having been defeated in the first suit, he brought a second suit on the same, and which suit he has since discontinued to bring the present suit? He saith:

Answer. I never heard that any suit had been brought in the name of Mr. Murphy on the notes until within a few days ago.

Fifth. To the fifth cross-interrogatory, to wit: Have you
182 corresponded with said Murphy, in relation to these notes; if so, annex all the letters you have received from him, and your answer? He saith:

Answer. I have never written to Thomas H. Murphy respecting these notes, and have received no letters from him in relation thereto, except that a few weeks since he wrote to me to forward some money to him for expenses, which I did by a letter of credit from the Bank of New York on New Orleans, which I enclosed to him. This was not over a month ago.

(Signed) PETER A. H. JACKSON.

Sworn to and subscribed before me this the 26th day of March, in the year 1868.

[SEAL.] (Signed) HENRY C. BANKS,
Commissioner for Louisiana, No. 3 John street. New York City.

183 I, Henry C. Banks, the undersigned commissioner for Louisiana, do certify that I caused Deborah A. Westerfield and Peter A. H. Jackson, witnesses hereinbefore named and examined, to appear before me at the time and place above named, and after publicly and solemnly swearing each separately to tell the truth, the whole truth, and nothing but the truth, in answer to the annexed direct and cross-interrogatories, I then and there proceeded to examine each separately by propounding to him the said direct and cross-interrogatories, and reducing in my presence and that of the witness his answers in writing, by my clerk, Stephen W. Laidler, for that purpose by me appointed, and I then caused each witness to sign his deposition in my presence as already stated.

In testimony whereof I have hereunto set my hand and seal
184 on this the twenty-eighth day of March, in the year 1868.

[SEAL.] (Signed) HENRY C. BANKS,
Commissioner for Louisiana, No. 3 John street, New York City.

United States Circuit Court district of Louisiana.

Notice to take testimony.

P. A. H. JACKSON *et als.*, *vs.* S. & L. FASNACHT. } No. 5401.

To G. Schmidt, esq.:

You are hereby notified that testimony will be taken in the above entitled cause on Saturday, the 16th day of May, 1868, before D. Urban, U. S. commissioner, at the clerk's office of this court, at 5½ o'clock p. m., on behalf of plaintiffs.

(Signed) F. B. VINOT, *D'y Clerk.*

185 *Marshal's return.*

NEW ORLEANS, *May 13th*, 1868.

Received May 13th, 1868, by the U. S. marshal, and on same day of May, 1868, served copy of within notice on G. Schmidt, attorney named herein, personally, at office, 57 Royal street, in this city.

New Orleans, May 14th, 1868.

(Signed) S. W. REED,
D'y U. S. Marshal.

United States Circuit Court.

Testimony on behalf of plaintiffs, offered in evidence by plaintiffs, and filed May 18th, 1868.

P. A. H. JACKSON *et als.*
vs.
S. & L. FASNACHT. } No. 5401.

Testimony in the above-entitled cause, taken on behalf of plaintiffs before D. Urban, U. S. commissioner, as per notification of plaintiff's counsel.

186 W. S. Benedict, of Hornor & Benedict, of counsel for plaintiffs, present.

G. Schmidt, of counsel for defendants, present.

T. H. Murphy, being duly sworn, says: being shown two notes, says:

(The defendants in this suit reserve to themselves all legal objections to the testimony of this witness in this cause, except as to the form and manner of taking the testimony.)

These notes marked T. & H., annexed to commission, belong to Mrs. Deborah A. Westerfield and Peter A. Jackson. They were sent to me as their agent to collect these notes, and made them payable to my order. I put these notes in the hands of Durant & Hornor, attorneys, for collection. I had previously attempted to collect. I had seen Mr. Fasnacht repeatedly on the subject, and I could not collect them. Mr. Fasnacht said he would pay the
187 notes with interest to maturity, but not to date. I was only authorized to receive the same with interest to date of collection. I have no interest in these notes. Mrs. Westerfield and Mr. Jackson reside in the city of New York; they are citizens of the State of New York.

Cross-examined.

I got possession of these notes, I believe, about the early part of 1864. I cannot mention the exact day.

Question. When did you hand those notes to Durant & Hornor for collection?

Answer. Says it was after the time I received them. I cannot be positive about the date. I did not know until after the institution of the suit that suit was brought in the sixth District Court in my name for the collection of these notes. I believe there were two suits brought in regard to these notes. I can't say how long after the first suit was brought that I ascertained that the suit was
188 brought in my name. I was so informed by my counsel. I did not know that an order of seizure and sale issued on the property on which there was a mortgage to secure the payment of these two notes, in the sixth District Court. I was in the State of Missouri at the time. I learned from my counsel that the defendants had appealed to the Supreme Court from the order of seizure and

sale of the sixth District Court. It was after my return in 1866, from Missouri, that I was informed by my counsel that the defendants had appealed. I think I was in New Orleans when the first suit was instituted. I left for the State of Missouri in November, 1865. I remained absent seven months. I do not recollect when the suit was decided against me in the Supreme Court. I can't say how long after the first suit was decided that the second suit
189 was brought. Messrs. Benedict & Hornor, successors to Durant & Hornor, were my counsel in the second suit. I employed them. I did not know that the second suit was brought in my name until after it came up. I was cited twice before the sixth District Court, and was only on the stand once. I did at this time know that suit was brought in my name. My counsel informed me that they had a right to sue in my name. When I found it out I spoke to counsel about it, and they then told me that they had a right to sue in my name. I reside at present in New Orleans. I am a citizen and resident of the State of Louisiana. My domicil has been in Louisiana since 1850. Mrs. Deborah Westerfield resides in New York city. I know this fact from corresponding with
190 her. I visited her at her residence in New York city. I have been a visitor for eight years. I saw her last in 1860. I received a letter from her about three weeks ago in reference to these notes; this is my latest correspondence with her. Mrs. Westerfield is an aunt of my wife.

Question. Did you ever inform Mrs. Deborah Westerfield that the Supreme Court had reversed the judgment you had obtained in the sixth District Court?

Answer. I never informed her in that manner.

Question. Did you ever inform Mr. Peter A. H. Jackson that the Supreme Court had reversed the suit on these notes, brought in your name in the sixth District Court in New Orleans.

Answer. I did.

Question. When did you inform him of that fact?

Answer. Immediately after suit was brought in the U.
191 S. Circuit Court, when I told him we had instituted this suit in his and Mrs. Westerfield's name.

Question. Did you about the same time inform Deborah Westerfield of the fact that you had communicated to Jackson, as above stated?

Answer. I told her and Mr. Jackson that the suit had been brought formerly in my name, and it was objected to; and that, consequently, we had brought suit in their names, as they were the owners of the notes and I was only their agent to collect them. This was communicated to them by letters. They have acknowledged the receipt of those letters. I reside at 789 Magazine street, in the city of New Orleans. I have a place on Barataria Bayou where I go to almost every week. I am rolling India bagging, taken out of bales into rolls. I also have a small rope manufactory.

192 Question. Did you ever inform either Mr. Jackson or Mrs. Deborah Westerfield, previous to the institution of this suit

in the United States Circuit Court, that you had brought a second suit on these notes in the sixth District Court in New Orleans?

(Objected to by counsel for plaintiffs, on the ground that the same has been herebefore been asked and answered.)

Answer. I informed Mrs. Westerfield that my counsel did not know what the notes were payable to me, and therefore entered the suit as they did before, by putting my name, the wrong name, instead of in their name, "Mrs. Westerfield and Peter A. H. Jackson's names;" that Messrs. Hornor & Benedict were different persons from Messrs. Durant & Hornor, and were their successors in business, and that they had my suit. I informed Mrs. Deborah Westerfield of
193 this fact after suit was instituted the last time in the sixth District Court, about the time the suit was going on, when it came to my knowledge. I don't recollect if I have kept a copy of this letter. I received an answer to it. I receive answers to all my letters.

(Signed) T. H. MURPHY.

Sworn to and subscribed before me May 16th, 1868.

(Signed) D. URBAN, *U. S. Comm'r.*

Circuit Court of the United States.

Note of evidence.—Filed May 18th, 1868.

P. A. H. JACKSON *et als.*
vs.
SAM'L & LOUIS FASNACHT. } No. 5401.

DISTRICT OF LOUISIANA:

Plaintiffs offered the testimony of witnesses taken under commission, also the two notes sued on, and also the documents annexed to commission.

194 Plaintiffs offered record No. 5401, U. S. Circuit Court, originally instituted in 6th court, No. 11058 A, and record 19649 6th court, B; also testimony of T. H. Murphy, C.

Testimony of witnesses taken under commission offered by plaintiffs. "Transcribed at page 143."

Two notes sued on offered by plaintiffs. "Transcribed at pages 6 and 7."

Documents annexed to commission. "Transcribed at page 149."

Record No. 5401 U. S. Circuit Court, originally instituted in 6th court, No. 11058. "Transcribed at page 28," offered by plaintiffs.

Record 19649, 6th court. "Transcribed at page 72," offered by plaintiffs.

Testimony of T. H. Murphy. "Transcribed at page 185," offered by plaintiffs.

Judgment.

195 P. A. H. JACKSON *& als.*
vs.
S. & L. FASNACHT. } No. 5401.

Extract from the minutes of Monday, May 18th, 1868.

This cause came up for trial, Hornor & Benedict for plaintiffs, G. Schmidt for defendants.

When after hearing the pleadings, evidence and counsel, the plea of prescription having been overruled, it is ordered, adjudged and decreed that the plaintiffs, Deborah A. Westerfield, wife of Cornelius Westerfield, and Peter A. H. Jackson, do have and recover judgment against the defendants Samuel Fasnacht and Louis Fasnacht for the sum of twenty-eight hundred and thirty-three 33⅓-100 dollars, with 7 p. c. interest thereon from 17th March, 1860, till 17th March, 1862, and at the rate of 8 p. c. thereafter till paid, $3 50 copy of act, and costs of suit, with vendor's lien and special mortgage on the property described in the petition, and act of mortgage
196 passed before J. E. Jarreau, notary, on 2d April, 1860, a certified copy whereof is on file and made part hereof.

Rule for a new trial.

P. A. H. JACKSON *& al.*
vs.
S. & L. FASNACHT. } No. 5401.

Extract from the minutes of Thursday, May 21st, 1868.

On motion of G. Schmidt, attorney of defendants in the above suit, ordered that plaintiffs show cause on the 30th instant, at 11 a. m., why the judgment rendered in this cause shonld not be set aside and a new trial awarded on the grounds filed.

United States Circuit Court, district of Louisiana.

Rule and grounds.—Filed May 21st, 1868.

PETER A. H. JACKSON *& als.*
vs.
SAMUEL & LOUIS FARNACHT. } No. 5401.

197 On motion of G. Schmidt, attorney of defendants in the above suit, ordered that plaintiffs show cause on Saturday, the 30th day of May, 1868, at 11 a. m., why the judgment rendered in this cause should not be set aside and a new trial awarded on the following grounds, to wit:

F rst. Because said judgment is contrary to law in this—

1°. Because the plaintiffs having transferred their right, title and

interest in the notes sued on to Thomas H. Murphy, who has never retransferred his rights to plaintiffs, but on the contrary asserted his ownership to said notes in two different suits brought in the 6th District Court of New Orleans, as per evidence filed by the plaintiffs themselves, they, the said plaintiffs, have no standing in this court, and the court has no jurisdiction of the cause ratione materia.

198 2°. Because Deborah Westerfield being a married woman, and there being no evidence to shew that Cornelius Westerfield, her husband, has authorized her to bring the present suit, this suit as to her ought to have been dismissed.

Secondly. Because judgment is contrary to the weight of evidence in this, that the court not only permitted oral to destroy record evidence, but written testimony, contrary to the well established principles of law.

Thirdly. Because the court refused to exclude the depositions of the plaintiffs and of Thomas H. Murphy, and allowed plaintiffs counsel to strike out the endorsements, transferring the notes sued on to said Murphy, after motion made to exclude plaintiffs' depositions.

Fourthly. For other causes and reasons apparent on the face of the proceedings, and which will be more fully developed on

199 the trial of this rule.

Marshal's return.

Received May 22d, 1868, by the U. S. marshal, and on same day of May, 1868, served copy of within rule and grounds on Hornor and Benedict, attorneys named herein, in the hands of A. Murphy, clerk, at office, 18 Carondelet street, in this city.

(Signed) S. W. REED,
D'y U. S. Marshal.

Hearing and submission of rule.

Extract from the minutes of Saturday, May 30th, 1868.

P. A. H. JACKSON, *& al.*
vs. } No. 5401
S. AND L. FASNACHT.

The rule for a new trial taken by defendants on 21st instant was called, Hornor and Benedict for plaintiffs, G. Schmidt for de-

200 fendants; when after hearing argument the court took time to advise.

Order.—Rule discharged and new trial refused.

P. A. H. JACKSON, *& al.*
vs. } No. 5401.
S. AND L. FASNACHT.

Extract from the minutes of Monday, June 8th, 1868.

Ordered, That the rule taken by the defendants on 21st May, 1868, be discharged and a new trial refused with costs.

United States Circuit Court, fifth circuit and district of Louisiana, April term, 1868.

Judgment, from judgment docket.

NEW ORLEANS, MONDAY, *May 18th*, 1868.

Court met pursuant to adjournment. Present: Hon. E. H. Durell, district judge.

201 P. A. H. JACKSON, *& al.*
vs.
S. AND L. FASNACHT. } No. 5401.

This cause came up for trial, Hornor and Benedict for plaintiffs, G. Schmidt for defendants; when after hearing the pleadings, evidence and counsel, the plea of prescription having been overruled, it is ordered, adjudged, and decreed that the plaintiffs, Deborah A. H. Westerfield, wife of Cornelius Westerfield, and A. H. Jackson, do have and recover judgment against the defendants, Samuel Fasnacht and Louis Fasnacht, for the sum of twenty-eight hundred and thirty-three 33⅓–100 dollars, with 7 per cent. interest thereon from 17th March, 1860, till 17th March, 1864, and at the rate of 8 per cent. thereafter till paid, $3 50 copy of act, and costs of suit, with vendor's lien and special mortgage on the property described
202 in the petition, and act of mortgage passed before J. E. Jarreau, notary, on 2d April, 1860; a certified copy whereof is on file and made part hereof.

Judgment rendered May 18th, 1868.
Judgment signed June 9th, 1868.
(Signed) E. H. DURELL, *Judge.*

Circuit Court of the United States, 5th circuit and district of Louisiana.

Petition for writ of error and order allowing writ of error.—Filed June 15th, 1868.

P. A. H. JACKSON, *& al.*
vs.
S. AND L. FASNACHT. } No. 5401.

To the honorable judges of said court:

The petition of Samuel and Louis Fasnacht, citizens of Switzerland, residing in Louisiana, respectfully represents: That they have been advised that there is error to their prejudice in the final
203 judgment rendered on the 9th May, 1868, in a certain cause herein pending, wherein Deborah A. Westerfield, wife of Cornelius Westerfield, and Peter A. H. Jackson, are plaintiffs, and Samuel and Louis Fasnacht are defendants; that they feel aggrieved by the said final judgment, and that they desire to sue out a writ of

error returnable in the Supreme Court of the United States according to law; wherefore petitioners pray that a writ of error may be allowed them herein, the same to operate as a supersedeas, returnable in the Supreme Court of the United States on the first Monday of December next, on their giving bond and surety as the law directs, and they will ever pray, &c.

(Signed) G. SCHMIDT,
Att'y of Pet'rs.

Order.

A writ of error to operate as a supersedeas is allowed in this case as prayed for and according to law, returnable to the Supreme
204 Court of the United States on the first Monday in December next, the petitioners giving bond in the sum of seven thousand five hundred dollars, with good and solvent security as the law directs.

New Orleans, June 15th, 1868.

(Signed) E. H. DURELL, *Judge.*

United States Circuit Court.

Bond for writ of error.—Filed June 15th, 1868.

P. A. H. JACKSON, *& al.*
vs.
S. AND L. FASNACHT. } No. 5401.

Know all men by these presents, that we, Samuel and Louis Fasnacht, principals, and Frederick Hecker, as surety, are held and firmly bound unto Deborah A. Westerfield and Peter A. H. Jackson in the full and just sum of seven thousand five hundred dollars, to be paid to said Westerfield and Jackson, their certain attorneys,
205 executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 15th day of June, in the year of our Lord one thousand eight hundred and sixty-eight.

Whereas lately at a Circuit Court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said Circuit Court wherein the said Deborah Westerfield and Peter A. H. Jackson were plaintiffs, and Samuel and Louis Fasnacht defendants, a judgment was rendered against the said S. and L. Fasnacht, defendants, and the said Samuel and Louis Fasnacht having obtained a writ of error and filed a copy thereof in the clerk's office of the said Circuit Court to reverse the judgment
206 in the aforesaid suit, and a citation directed to the said Westerfield and Jackson, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday in December next:

Now the condition of the above obligation is such, that if the said Samuel and Louis Fasnacht shall prosecute their writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.]	(Signed)	SAMUEL FASNACHT.
[SEAL.]	(Signed)	LOUIS FASNACHT.
[SEAL.]	(Signed)	FRED. HECKER.

[25-c. int rev. stamp affixed and cancelled.]

Sealed and delivered in the presence of—
(Signed) F. B. VINOT.

Frederic Hecker, being duly sworn, deposes and says that he is worth the sum of seven thousand five hundred dollars over
207 and above his legal debts and liabilities.
(Signed) FRED. HECKER.

Sworn to and subscribed this 15th day of June, 1868, before me.
(Signed) F. B. VINOT, *D'y Clerk.*

U. S. Circuit Court district of Louisiana.

208 *Defendants' bill of exception.—Filed November 16th,* 1868.

P. A. H. JACKSON, *et als.*
vs.
S. & L. FASNACHT. } No. 5401.

Be it remembered that, on the trial of this cause, plaintiffs offered in evidence the deposition of Thomas H. Murphy (here insert said deposition) to the admission of which testimony defendants objected on the ground that it was in direct conflict with the judicial declarations of said witness in two suits of him, the said Murphy, on the identical notes sued upon by plaintiffs in this suit, instituted by him in the sixth District Court of New Orleans, and numbered 11058 and 16649, offered in evidence by plaintiffs and made part of this bill of exception (here insert said records) in which suits he claims the ownership of said notes; but the court, being of opinion that witness, although calling himself the owner of the aforesaid notes, could prove
that he was in point of fact agent of plaintiffs and acting for
209 their benefit, overruled the objection and admitted the evidence, to which defendants except, and pray that this their bill of exception be signed, which is done accordingly.
(Signed) E. H. DURELL, *Judge.*

U. S. Circuit Court, district of Louisiana.

Defendant's bill of exception.—Filed November 16th, 1868.

P. A. H. JACKSON *et als.*
vs.
S. & L. FASNACHT. } No. 5,401.

Be it remembered that, on the trial of this cause, plaintiffs offered in evidence their own depositions taken in New York, to the admission of which defendants objected (here insert said depositions) on the ground that plaintiffs having, by endorsing the notes filed in the suit, and thus transferred them, were not legally permitted in this cause to explain or vary the effect of said endorsements; but the court being of opinion that plaintiffs could by their own testimony show the purpose for which they endorsed said notes, and said endorsements
210 may be stricken out even then, after the objection was urged upon the court, admitted the testimony; to which ruling of the court, as well as to the permission immediately given plaintiff's counsel to strike out the said endorsements of Jackson and Westerfield, plaintiffs in the suit, of which they availed themselves, defendants except and pray that this their bill of exceptions be signed; which is done accordingly.

(Signed) E. H. DURELL, *Judge.*

Circuit Court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

UNITED STATES OF AMERICA:

I, Dominick Urban, clerk of the Circuit Court of the United States for fifth circuit and district of Louisiana, do hereby certify that the foregoing 210 pages contain and form a full, complete, true and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of Peter A. H. Jackson et al. vs. Samuel and Louis Fasnacht, No. 5401 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 16th day of November, A. D. 1868.

[SEAL.] D. URBAN, *Clerk.*

[5-ct. U. S. rev. stamp, cancelled.]

I, E. H. Durell, United States judge for the district of Louisiana, do hereby certify that Dominick Urban, whose name is signed to the above certificate as clerk of the Circuit Court of the United States for the fifth circuit and district of Louisiana, was at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand and seal, at the city of New Orleans, in said district, this 16th day of November, A. D. 1867.

E. H. DURELL, *Judge.*

[5-ct. int. rev. stamp, cancelled.]

212 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Circuit Court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or one of you, between Deborah Westerfield, wife of Cornelius Westerfield, and Peter A. H. Jackson, plaintiffs, and Samuel and Louis Fasnacht, defendants, a manifest error hath happened, to the great damage of the said Samuel and Louis Fasnacht, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon Portland Chase, Chief Justice of the Supreme Court of the United States, this 15th of June, in the year of our Lord one thousand eight hundred and sixty-eight.

D. URBAN,
Clerk of the United States Circuit Court
for District of Louisiana.

Endorsed: United States Circuit Court. No. 5401. Peter A. H. Jackson & al. vs. S. & L. Fasnacht. Writ of error. Filed June 15th, 1868. F. B. Vinot, d'y clerk.

213 UNITED STATES OF AMERICA, *District of Louisiana:*

The President of the United States to Peter A. H. Jackson, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the fifth circuit and district of Louisiana, wherein Samuel Fasnacht and Louis Fasnacht are plaintiffs in error and you are defendant, to show cause, if any there be, why the judgment rendered against the said plaintiffs, as in said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Su-

preme Court of the United States, this 19th day of June, in the year of our Lord one thousand eight hundred and sixty-eight.

E. H. DURELL, *Judge.*

Endorsed: United States Circuit Court. No. 5401. Peter A. H. Jackson & al. vs. Samuel and Louis Fasnacht. Citation in error. To Peter A. H. Jackson.

Marshal's return.

Received June 19, 1868, by the U. S. marshal, and on the 20th day of June, 1868, served a copy of the within citation in error on Peter A. H. Jackson, defendant in error named herein, by leaving the same in the hands of Wm. S. Benedict, esq., personally, one of the firm of Hornor & Benedict, attorneys for said Jackson, who is absent from the city, the said attorney accepting service of the same for said defendant in error.

New Orleans, June 20th, 1867.

S. W. REED,
Dep. U. S. Marshal.

214 THE UNITED STATES OF AMERICA,
District of Louisiana:

The President of the United States to Deborah A. Westerfield, wife of Cornelius Westerfield, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the first Monday of December next, pursuant to writ of error filed in the clerk's office of the Circuit Court of the United States for the fifth circuit and district of Louisiana, wherein Samuel Fasnacht and Louis Fasnacht are plaintiffs in error and you are defendant, to show cause, if any there be, why the judgment rendered against the said plaintiffs, as in said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 19th day of June, in the year of our Lord one thousand eight hundred and sixty-eight.

E. H. DURELL, *Judge.*

Endorsed: United States Circuit Court. No. 5401. Peter A. H. Jackson & al. vs. Samuel and Louis Fasnacht. Citation in error. To Deborah A. Westerfield.

Marshal's return.

Received June 19, 1868, by the U. S. marshal, and on the 20th day of June, 1868, served a copy of the within citation in error on Deborah A. Westerfield, the defendant in error, named herein, by leaving the same in the hands of Wm. S. Benedict, esq., personally,

one of the firm of Hornor & Benedict, attorneys for said Deborah A. Westerfield, who is absent from this city; the said attorney accepting service of the same for said defendant error.

New Orleans, June 20th, 1868.

S. W. REED,
Dep. U. S. Marshal.

RETURN TO CERTIORARI.

SUPREME COURT OF THE UNITED STATES.

No. 310.

SAMUEL AND LOUIS FASNACHT, PLAINTIFFS IN ERROR,

vs.

DEBORAH WESTERFIELD, CORNELIUS WESTERFIELD, AND PETER A. H. JACKSON.

FILED NOVEMBER 13, 1869.

SUPREME COURT OF THE UNITED STATES.

No. 310.

SAMUEL AND LOUIS FASNACHT, PLAINTIFFS IN ERROR,

vs.

DEBORAH WESTERFIELD, CORNELIUS WESTERFIELD, AND PETER A. H. JACKSON.

RETURN TO CERTIORARI.—FILED NOVEMBER 13, 1869.

1 To the hon. judges U. S. circuit court, fifth circuit and district of Louisiana:

The petition of Deborah A. Westerfield, wife of Cornelius Westerfield, and herein duly authorized, and Peter A. H. Jackson, all of whom reside in New York City, and are citizens of the State of New York, respectfully represents:

That Samuel Fasnacht and Louis Fasnacht, who are both citizens of the State of Louisiana, claiming a residence in the parish of Plaquemine, in this State, are justly and truly indebted unto your petitioners in the full sum of two thousand eight hundred & thirty-three $\frac{33}{100}$ dollars, with interest at seven per cent. per annum, from the 17th day of March, 1860, to the 17th March, 1862, and thereafter at the rate of eight per cent. per annum, together with three & $\frac{50}{100}$ dollars, costs of copy of notarial act and costs of suit for this, to wit:

That petitioners are holders & owners of two certain promissory notes, one of two thousand dollars and the other for eight hundred & thirty-three $\frac{33}{100}$ dollars, both drawn by Samuel & Louis Fasnacht to their own order, and by them endorsed; both dated New Orleans, March 17th, 1860, & both payable two years after date, with interest at the rate of seven per cent. per annum from date until maturity, and
2 at eight per cent. per annum from maturity until final payment, and both paraphed ne varietur New Orleans April 2nd, 1860, by J. E. Jarreau, notary public, all which will more fully appear by reference to the said promissory notes which are hereunto annexed and made part hereof, & marked "T" & "H."

Petitioners further show that by public act passed before J. E. Jarreau, then a notary in this city, on the 2nd day of April, 1860, in order to secure the payment of the aforesaid notes and others set forth in said act, to any holder thereof, the said Samuel and Louis Fasnacht did specially mortgage and hypothecate in favor of any holder or holders of said notes, as aforesaid, "six certain lots of ground with the buildings and improvements thereon, situate in the first district of this city,

in the square bounded by Annunciation, Poeyfarre, Duplantier, & Foucher streets, designated by the numbers one, two, three, four, five, & fourteen, on a plan drawn by C. A. Hedin, on the 18th March, 1852, and deposited in the office of H. B. Cenas, notary public, for reference, which said act of mortgage imports a confession of judgment in favor of any holder or holders of said note; all of which will more fully appear by reference to an authentic copy of said notarial act hereto
3 annexed & made part hereof and marked "M."

Petitioners allege amicable demand and refusal to pay.

They further represent that on 9th February, 1864, they instituted proceedings against said defendants in the name of their agent, Thomas H. Murphy, by executory process in the sixth district court of New Orleans, under the number 11,058, and that defendants appealed from the order allowing the same, and on said appeal the order of the lower court was reversed.

That thereupon petitioners did, as aforesaid, enter suit before the same court via ordinaria, by petition & citation, and that since the institution thereof said defendant have plead their domicil to be in the parish of Plaquemine, which petitioners are unable to disprove, and they now appear before this honorable court, under the acts of Congress granting them the right, in order that may have enforced the contract and obligation of defendants, and that justice may be done to them.

Wherefore, they pray that said Samuel Fasnacht and Louis Fasnacht be cited to answer this petition, & after due proceedings petitioners have judgment against them in the aforesaid sum of $2,833 33⅓,
4 with interest thereon at 7 % per annum, from 17th March, 1860, till 17th M'ch, 1862, and at 8 % per annum thereafter till paid, $3\frac{50}{100}$ copy of act, and costs of suit, with vendor's lien & special mortgage on the property described in the act of mortgage passed before J. E. Jarreau, notary, on 2d April, 1860; and petitioners pray that right and justice may be administered in the premises & for general relief.

[SEAL.] (Signed) HORNOR & BENEDICT,
Att'ys for Pet'rs.

United States circuit court, fifth circuit and district of Louisiana, clerk's office:

I, Dominick Urban, clerk of said court, do hereby certify that in obedience to the annexed writ of certiorari, emanating from the honorable the Supreme Court of the United States, & to me directed, I have made a just, true, and correct copy of the original petition filed on the 7th January, 1868, and referred to in said writ of certiorari, and that the above and foregoing 4 pages do contain the just, true, and correct copy of said original petition on file in the records of my office, and that the allegations of citizenship set forth in said copy were taken
5 from the original petition, and were contained therein on the day of its said filing, the 7th day of January, 1868.

Witness my hand & seal of said court, at New Orleans, this 8th day of November, 1869.

[SEAL.] D. URBAN, *Clerk U. S. C. C.*

THE UNITED STATES OF AMERICA, *ss:*

6 The President of the United States of America to the judges of
[SEAL.] the circuit court of the United States for the district of Louisiana, greeting:

Whereas in a certain suit in said circuit court, between Deborah Westerfield, wife of Cornelius Westerfield, and Peter A. H. Jackson, plaintiffs,

and Samuel and Louis Fasnacht, defendants, which suit was removed to the Supreme Court of the United States by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

7 "In that, whereas, in the original petition filed in said circuit court by the said defendants in error, it was alleged that the said defendants in error were citizens of the State of New York, and that the plaintiffs in error were citizens of the State of Louisiana, yet the clerk of the circuit court aforesaid, in making his return to the writ of error herein, has entirely omitted said allegations of citizenship from his copy of the petition, as found in the transcript of the record now on file here and returned with the writ:"

You, therefore, are hereby commanded, that, searching the record and proceedings in said cause, you certify what omissions and errors you shall find to the said Supreme Court of the United States, so that you have the same together with this writ before the said Supreme Court forthwith.

8 Witness the Honorable Salmon P. Chase, Chief Justice of said Supreme Court, this fifteenth day of October, A. D. eighteen hundred and sixty-nine.

[SEAL.]

D. W. MIDDLETON,
Clerk Supreme Court U. States.

Issued 30th October, 1869.

(Indorsed:) Supreme Court of the United States, Dec. term, 1868. No. 310. Fasnacht *vs.* Westerfield et al. Writ of certiorari.

(Indorsement on return:) Supreme Court, U. S., 1868, Dec. term. No. 310. Additional record. Samuel & Louis Fashnacht, pl'ffs in error, vs. Deborah Westerfield & Cornelius Westerfield & Peter A. H. Jackson. Writ of certiorari & return.
Filed 13 November, 1869.

No. 310.

SUPREME COURT.

OF THE UNITED STATES.

SAMUEL AND LOUIS FASNACHT

Vs

DEBORAH WESTERFIELD, Wife of Cornelius Westerfield, & PETER A. H. JACKSON.

In error to the Circuit Court of the United States for the District of Louisiana.

STATEMENT OF THE CASE.

for the Pffs in Error

"Renaissance Louisianaise" Job Office Print,
48 Conti street.

No. 310.

SUPREME COURT.

OF THE UNITED STATES.

SAMUEL AND LOUIS FASNACHT

Vs

DEBORAH WESTERFIELD, Wife of Cornelius Westerfield, & PETER A. H. JACKSON.

In error to the Circuit Court of the United States for the District of Louisiana.

STATEMENT OF THE CASE.

The plaintiffs in error bought, on the 17th March, 1860, of the heirs of Elizabeth McCarter, being thirteen in number, whose names are all to be found in the three acts of mortgage, at pages 3, 12 and 26 of the record,— certain real estate in the city of New-Orleans for the sum of twenty thousand five hundred dollars, of which, defendants in error pretend that there was due to them, on the 7th January, 1868, two notes, one for $2000,00 and the other for $833 00, to recover which amounts with interest and costs the present suit was brought.

To this petition plantiffs in error filed 1st. a plea to the jurisdiction, 2d. the plea of *lis pendens* (R. P. 9).

Both of these pleas having been overruled, an answer was filed which denying 1st., that plaintiffs were holders and owners of the notes sued on, and averring, that one Thomas H. Murphy, residing in New Orleans and a citizen of Louisiana, is the true owner, and asserting that the pretended transfer to plaintiffs is merely colorable, and made for the purpose of giving jurisdiction to the Circuit Court.

2d. They plead the prescription of five years as a perpetual bar to the claim of defendants in error.

3d. They deny that said defendants are entitled to judgment against them in this suit. [Record p. 43-4].

Upon these facts the three following legal questions present themselves for solution :

First, Had the Circuit Court of Louisiana jurisdiction of the cause ?

Secondly, Had the parties the requisite capacity to stand in judgment ? and

Thirdly, Should not the plea of prescription have been maintained ?

We proceed to examine the preceding questions in the above order and

First we maintain that *the plea to the jurisdiction* should have been sustained.

On the 9th of February, 1864, Thomas H. Murphy, a resident of the city of New Orleans, brought a suit on the identical notes in controversy in this suit, styling himself the owner and holder thereof, [R. p. 10], which suit was dismissed by the Supreme Court of Louisiana, [see Decree R. p. 22].

On the 18th February, 1867, he brought another

suit on the same notes, styling himself still the owner and holder of them, [R. p. 24]. In both of the aforesaid suits, the notes sued on in this case are annexed, and they are by special endorsement made payable to Thomas H. Murphy.

At the time of the filing of the plea to the jurisdiction, as well as on the trial of the plea, the record showed that Murphy was sole owner of the notes, the defendants in error having, by special endorsement, transferred to him all their rights to the same. Yet the Judge, without regarding the record, which furnished conclusive proof in support of the plea, overruled the same.

To this exception was taken [R. p. 70].

This is the first error on which we rely for a reversal of the judgment, believing that every judge, when called upon to decide a question of law or fact, must decide it in conformity to the *allegata* and *probata*, and when, as in this instance, he has clearly failed to do so, he has commited an error, and his judgment must be reserved.

Secondly, Had the defendants in error the capacity requisite to enable them to sue in the Circuit Court ?

We think not, for the following reasons :

1st. It has been repeatedly decided, that when a joint interest is prosecuted, each individual named as a party plaintiff must be entitled to invoke the jurisdiction of the court. [Morrison vs. Bennet, 1 McLean, 330 ; Rogers vs. Linn, 2 Id. 126 ; Anderson vs. Jackson, 2 Paine 426].

Hence, if one of the parties, plaintiff in the Circuit

Court, was not entitled to sue, the suit must be dismissed.

One of the parties to the present suit is Deborah Westerfield, wife of Cornelius Westerfield, said in the petition, to be "herein authorized," without saying by whom.

Mrs. Westerfield and her husband live in New York, and the presumtion of law is that her marital rights are governed by the principles of the common law of England, in wich event, we believe, it certain that she is not entitled to sue in her own name.

By the common law, marriage is an absolute gift to the husband of all the goods, personal chattels, and estate, of which the wife was actually and beneficially possessed at the time of the marriage, in her own right, or which at that time were in the possession of a third person, and of such other goods and personal chattels as came to her during the marriage (Co. Litt. 300.)

As a consequence of this rule, the husband may sue in his own name for all the personal estate, which accrued to his wife, or to her and him jointly, during the marriage, or in respect to all personal contracts and covenants made or entered into with them during that period. Hilliard vs. Hambridge, Aleyn 16; Owen 82; Stra. 230; Cro. Jac. 399; Ankerstein vs. Clark, 4 Term R. p. 616; Philliskirk vs. Pluckwell, 2 Maule & Selw. 393, 396.

Even in actions where the consideration moves wholly or in part from the wife, and she is the meritorious cause of the action, the husband may assent

to give her an interest in the contract and join her with him in the action. Rose vs. Bowler; 1 H. B. 108: 2 Wils. 424. Hence it follows, that a married woman, according to the principles of the common law, has no right to sue in her own name in a case like the present, and the suit must be brought in the name of her husband.

2d. Under the Louisiana law, the property of the wife is not transferred to her husband, when she marries, but remains her own, although, if constituted as dower, the husband has the administration of it, and she may confide to him the administration of the paraphernal property.

But, in this system of laws, the wife is under the guardianship of her husband, and she cannot bring suit, or appear in court as defendant, without his authority, or that of the judge, (3 N. S. 515; 6 R. 77; 5 A. 631).

In the absence of an express authorization the part of the husband, his joining her in the suit is sufficient; but under no circumstances will her own declaration in the petition, that she was authorized, suffice and, if there be no proof *aliunde* of such authority, the suit must be dismissed [Lacour vs. Delamarre, 2 A. 140; Dunn vs. Woodward, 11 A. 265].

The present suit should consequently have been dismissed in the Circuit Court,—not only because there is no evidence of her authority to sue, except her own declaration, but because even that assertion is so vague, that it is impossible to determine whether she derived the authority from her husband, or from the

Judge. It is, however, certain, that the husband did not join her in the suit, and there is no evidence that either he or the judge authorized her to sue. The necessary consequence resulting from this state of facts is, that the suit cannot be maintained.

The remaining question to be considered is therefore.

Thirdly, If the present action is not prescribed by the lapse of five years prior to the institution of the present suit ?

Prescription, which is a manner of acquiring property, or of liberating one-self from the payment of debts, by the lapse of time, is admitted in every system of jurisprudence. The Romans jurists declared, that "*Bono publico usucapio introducta est.*"

The Louisiana Code provides, Art. 3503. "Actions "on bills of exchange,—notes payable to order or "to bearer, except banknotes,—those on all ef- "fects negotiable or transferable by indorsement or "delivery, are prescribed by five years, reckoning "from the day when these engagements were paya- "ble."

The notes sued on are dated the 17th March, 1860, and they were payable two years after date, to-wit, the 20th March, 1862, and they were prescribed on the 21st March, 1867, unless the prescription was interrupted or suspended during the interval.

The present suit was instituted on the 7th January, 1868, more than five years after the notes were due, and hence, it is incumbent on the parties claim-

ing payment to show, that these notes are not prescribed.

To establish this, they must show,

1st. That the prescription has been *interrupted*, or

2d. That it has been *suspended* during a sufficient period of time to render it inoperative at the time of the institution of the present suit.

Either of these defenses would suffice.

We shall therefore inquire, —

First, If prescription has been interrupted?

The Louisiana Code recognizes two kinds of interruption to-wit, *a natural* and *a legal* interruption.

It is not pretended, that there existed any natural interruption, such as is defined by Art. 3483, which is inapplicable to claims of this nature.

A legal interruption must, hence, be proved.

This takes place when a party has been *cited to appear* before a court of justice, and it is immaterial whether the court be competent or not. C. C. 3484.

The original suit, brought on the 9th February, 1864, was a proceeding *in rem* against the property mortgaged, and the petition does not pray for citation, and defendants were not cited. [See Record p. 10 to p. 24].

The second suit was instituted on the 18th February, 1867.

In that case, a citation issued but was never served. An attempt was made to serve it *at the late domicil* of plaintiffs in error on the 12th of March, 1867, by order of defendant's attorney; but the service of this citation was, by the judgment of the Sixth District

Court of New Orleans, declared null; consequently the Fasnachts were never "cited to appear," as required by law. See opinion of judge R. p. 40 in wich he declares: "when a citation is not personal, "there is but one place where it can be made legal- "ly, and that is the *actual* and *not the late residence* "of defendant at the time of the service."

In consequence of this opinion, the defendants in error discontinued their suit in the Sixth District Court on the 23d January, 1868, R. p. 40, sixteen days after they had instituted the present suit, and two days after the pleas to the jurisdiction, and *lis pendens*, had been filed in the cause.

This voluntary discontinuance destroyed the effect of the citation, even if it had been regularly served, because the 3485th Art. C. C. declares, that when the plaintiff abandones or discontinues his demand, "*the interruption* shall be considered as having never "happened."

It will, however, in al probability, be maintained, that the taking out an order of seizure and sale, known also as *executory process*, in the practice of Louisiana, interrupted prescription.

Plausible arguments can certainly be found, deducible from the decisions of the Supreme Court of the State, in support of this doctrine; but we think, that on a careful analysis of the adjudications of that Court, it will appear that the seizure of the property does not interrupt prescription.

We have already shown, that the law requires the

defendant to be cited in order to interrupt prescription.

The nature and form of the citation is explained in Art. 179 of the Code of Practice, and the Record in the cause shows the difference in the mode of proceedings in the case where the executory process is resorted to, in lieu of an ordinary suit.

The former is a proceeding *in rem*, upon which an order issues addressed to the sheriff, directing him to seize and sell the property, in order to pay the plaintiff's demand. On the receipt of this writ, the sheriff informs defendant, that, unless the amount claimed be paid within three days, he will sell the mortgaged property. If the payment is not made as demanded, the sheriff seizes the property and informs defendant that he shal in three days advertise the property for sale unless the plaintiff's claim be immediately paid. [See R. p. 17 to 19 for the writ and the proceedings under it].

In an ordinary suit, the defendant is regularly cited to comply with plaintiff's demand, or to file his answer to it within ten days. (See R. p. 20).

In proceedings on executory process, the defendant is not called upon to answer, and he must pay or allow his property to be sold. It is true, that he is not without some remedy, for he can appeal from the order of seizure and sale, as defendants did, or he may, in certain cases, obtain an injunction. Both of these remedies are attended with expense and trouble, and the resorting to an act of seizure and sale, being considered a harsh remedy, is never favored by the courts.

The courts of Louisiana regard an order of seizure and sale as a quasi judgment, that may be appealed from, but not as a judgment in the true and legal sense of the term. Harrod vs. Voorhies. 16 La 256.

In the same case it is decided that the issuing of executory process *does not interrupt prescription.*

This decision, which appears to be in harmony with the code, which makes the interruption depend on the service of citation, has been somewhat shaken by subsequent decisions. Yet, we believe, that a careful analysis of the jurisprudence of Louisina will show, that the present doctrine of its courts is, that the issuing of an order of seizure and sale does not interrupt prescription,—in a case like the present,

In Stanbrough vs. McCall, 4 A. 322, the Court states the question, arising under the plea of prescription in that case to be, " whether one, who, under pretense of rights which have been adjudged to be unfounded, has unlawfully used the proces of a court of justice, to restrain another in the prosecution of a right, can avail himself of the delay which his own wrong has occasioned to defeat that right ; [Ib. 323,] and decides the negative, because to decide it otherwise would be shocking to " reason anb natural justice " and " repugnant to authority. " In the same case, on a rehearing, the Court enters into a long disertation on the effect of the clause *de non alienando* in act an of sale, and upon the authority of D'Argentré, and B. 7. Tit. 40, of the Justinian Code, it is decided, that the hypothecary proceeding interrupted the prescription of the personal action.

It would be easy to show, that the authorities on which the learned judge relies do no authorize the conclusion draw from them, and that in his anxiety to prove how carefully he had examained the question, he overlooked the important fact, that the writ of seizure and sale was unknown both in Brittany, on whose laws D'Argentré wrote his commentaries, and at Rome, This mode of proceeding is derived from the Spanish law, wherein it is called "*Juicio ejecutivo*" it is the growth of feudal times and tenures in Spain, and was unknow in the Roman law.

Inasmuch as this opinion on the rehearing was in point of fact unnecessasy to the decision of the cause, it must be regarded as an *obiter dictum*, which cannot be invoked as a precedent. Indeed, it is apparent from the decision in the case of Stanbrough vs. McCall 4 A. 328, that all the Court intended to decide, and did decide, was this, that the pessonal action "was " suspended during the judicial restraint unjustly " caused by Stockton, (the defendant) himself."

In the case of Fortier vs. Zimpel, 6 A. 54; the case of Stanbrough vs, McCall is relied on as authority; but in that case, as in that of McCall, the parties pleading prescription had themselves been the cause of the delay, and the principle, that a man cannot profit by his own wrong, is equally applicable.

In the case of Rhea vs. Taylor, 8 A. 23, the case of Stanbrough vs. McCall is referred to as sustaining the doctrine that the proceeding *via executiva* interrupt prescription.

This case is very loosely reported, and at all

events, it will not be presumed to go further than the authority on which it relies, and hence, applies only to cases wherein the party invoking the prescription has, by his wrongful acts, caused the delay of which he wants to avail himself.

The case of Walker & Co, vs. Lee, 20 A. 102, where the decisions in 4th, 6th and 8th Annual Reports were affirmed, was a case litigated on the merits, and in which an injunction was obtained, and the head note consequently properly states, that the "proceeding *on an order of seizure and sale, which is* "*litigated by defendant, (we presume wrongfully), inper-* "*rupted prescription.*" For this we hold, is all that has ever been decided.

But in the present case there was no litigation. no contest on the merits, and the parties, defendants in the lower court were not cited. The plaintiff in the suit obtained a judgment, to which he was not entitled, directing defendants; property to be seized and sold, from which they appealed, which appeal was sustained, and the decree ordering the seizure annulled. The wrongful act in this case was committed by plaintiff, and if it be true, that defendant could not avail himslf of his own wrong in unlawfully using the process of the Court to delay the plaintiff in attaining his just rights, it must *e converso* be also held, that where the plaintiff unlawfully ressorts to the process of a court to which he is not entitled, he will not be permitted to disregard the time he has employed in doing the wrong, and say, it shall not operate to his prèjudice. The very smallest penalty, that can be inflicted on him

in such a case, is to consider, that he has remained inactive during the continuance of the wrongful act, because, otherwise, you permit him to profit by his own wrong.

The property seized cost the Fasnachts $20,500 00, and there remained due on it $2800, according to the plaintiff's allegations It may safely be presumed, that the seizure, and the retaining possession of it by the sheriff for about three years, must have caused defendants great damage.

Creditors have rights, which must be respected ; but debtors have likewise certain legal rights, which creditors ought not to be permitted to violate with impunity.

In addition to the foregoing considerations, the plaintiffs in error invoke for their protection another legal principle, which is, that "statutes of prescription " cannot be extended from one action to another. " (15 A. 145, Garland vs. Scott).

The plaintiff below had by law two kinds of actions, for he could sue, either *via executiva*, or *via ordinaria:* he chose to former mode of proceeding, to which he was not entitled, and he now claims to profit by his own want of skill. In so doing, he insists on obtaining the same advantage as the law would afford him, had he brought an ordinary action before an incompetent judge by the provisions of C. C. Art. 3484 ; but this he cannot be permitted to do, because the lawmaker has not so ordained, and he cannot by analogy extend the rule intended to apply to one state of facts, to another and dissimilar. The judge, in the case we

are considering, was competent; but the facts on which plaintiff relied did not authorize the action he brought. To permit him to take advantage of his own ignorance, or wilful disregard, of the law would, hence, be contrary to the well-known maxim, "*ignorantia legis neminem excusat*"; and will certainly not be tolerated.

We have hitherto considered the present plaintiffs in the Circuit Court as identical with plaintiff in the two suits brought in the Sixth District Court of New Orleans.

But inasmuch as they are entirely different, Thomas H. Murphy having brought suit on the two notes of which he averred himself to be the owner in the State Court, while Mr. Jackson and Mrs. Westerfield are the plaintiffs in the present suit, hence, we propose to inquire how far the acts of Murphy do affect the rights of the plaintiffs in this suit.

Murphy in his suit *via executivi* acted in his own name, and as owner of the two notes which are the foundation of the present action; his suit was dismissed as unauthorized by law, and hence, null; but according to the maxim of the civil law, "*quod nullum est nullum producit effectum*; we infer, that this act of nullity of Murphy cannot be revived and acquire viatality, in favor of the present plaintiffs. So, also, in the second suit by Murphy, his voluntary discontinuance of the same destroyed the interruption, even if the citation had been regular, which was not the case.

From the foregoing facts, we think it results conclusively, that no act of Murphy can be fairly construed

as a legal interruption of the prescription, and that, at all events, plaintiffs cannot avail themselves of his acts, exercised for his own benifit, which he could not transfer.

In addition to the foregiong considerations, it is proper to observe, that the effects of prescription in favor of one person does not extend to another. This doctrine is held by Troplong, one of the ablest commentators on the French Civil Code, from which the Code of Louisiana is derived; for he says, in his treatise on prescription, No. 626, "*ce qui a été prescrit au profit* "*de l'un ne s'étend pas aux autres.*"

The same doctrine is more forcibly expressed by Mecadé, in his commentary on prescription and the 2250th Art. of the Napoleon Code, for his says: "*En* "*régle générale, l'interpellation interruptive, quelle qu'elle* "*soit,* [*assignation, citation, commandement ou saisie*], "*et comme elle la reconnaissance du droit, en d'autres* "*termes toute interruption civil, à difference de l'in-* "*terruption naturelle, ne produit sont effet qne relative-* "*ment, c'est-à-dire pour ou contre les deux personnes* "*entre lesquelles l'acte c'est passé, sans pouvoir s'étendre* "*de l'une d'elle à aucune autre:* a personâ ad personam "non fit interruptio activé nec passivé."

He adds, "*c'est l'application de la régle* res inter "alios acta aliis non nocet aut prodest." [p. 147.]

As these authors are deemed the ablest, who have hitherto commented on the French Civil Code, and their views are generally respected and followed in Louisiana, we take it for granted that the doctrine they maintain, both on account of its reasonableness,

and the high authority of the writers will be considered good law. In the case Rabel vs Pourcian, 20 A. 131, the Supreme Court of Louisiana, on the authority of Troplong and Marcadé, decided that the existence of the late civil war did not interrupt prescription, if sufficient time after the cessation of the war had occurred to enable the creditor to assert his rights. This decision, though strenuously opposed as contrary to the maxim, "*contra non valentem agere non currit prescriptio*," was still maintained, and adhered to in subsequent decisions. Durbin vs. Spiller, 20 A. 219; Payne & Harrison vs. Douglas, Ib. 280, Marcy vs. Steele, Ib. 413; Schlenker vs; Taliaferro, Ib 565.

We refer to these decisions as proving the authority of those authors.

There is moreover another principle which shows that the proceeding *via executiva* does not interrupt prescription in the case under consideration, and it is this: "It is a citation in justice that interrupts the prescription." We have already endeavored to demonstrate that the act of seizure and sale was unaccompanied by a citation. Let us, however, suppose that the demand of the sheriff and his seizure of the property were equivalent to a citation, would this enable the plaintiffs to establish an interruption of prescription? Clearly not, unless they can show that their suit terminated in a final judgment in their favor. This principle is well settled, Marcadé, in his commentary on Art. 2248 of the French Code, which is identical with the 3486th Art. of the Louisiana Code, says: "La citation en justice produit elle égal-

ement de l'interruption, (toujours, bien entendu, sous le condition dêtre suivie d'un *jugement* definitif favorable au demandeur)." The very manner in which he states the question proves, that when plaintiff fails in his demand, as in the present case, prescription is not interrupted. Marcade, *Prescription* p. 128, 129, Paris Ed. of 1854. Troplong recognizes the same doctrine in his work on Prescription Nos. 605, 606 and 609.

The result of the preceding examination of the law applicable to the subject appears be as follows:

I. That the executory proceedings of Murphy did not interrupt the prescription.

1st. Because not preceded by citation.

2d. Because his claim was not litigated on the merits, but merely as to the form of the action.

3d. Because judgment went against him and his suit was dismissed.

II. The second suit in the Sixth District Court, having been voluntarily dismissed did not operate an interruption of prescription.

III. Even if Murphy had by his proceedings interrupted prescription, this cannot avail Mrs. Westerfield and Mr. Jackson, the present plaintiffs, because "*res inter alios non nocet out prodest.*"

Hence, inasmuch as more than five years had elapsed prior to the institution of the present suit, and nothing has occurred either to interrupt or suspend prescription in favor of the present plaintiffs, we respectfully insist, that the plea should have been sustained.

It is possible that the defendants in error may contend that the prescription on which we rely does not affect them.

1st. Because they reside in New York, and could not have sued the Fasnachts, who reside in New Orleans, during the war.

That this defense cannot avail them, we have shown by reference to numerous decisions of the Supreme Court of Louisiana, declaring that when sufficient time is left after the cessation of the war for them to assert their rights, the time when they could not exercise them will not be counted. The war ended in 1865: this suit was brought in 1868, nearly three years after the removal of the impediment, and the time allowed them to act was clearly sufficient.

2d. They may contend that as citizens of New York, they are not bound by the prescription of Louisiana; but such a position is not tenable. Because *the lex loci contractus governs the litis decisionem* [2 Boullenois 461; Voet de Stat 10, No. 35, Casaregis Disc 43, 130, No. 28]. And Louisiana being the place where the contract was entered into and had to be enforced, there can be no doubt that the prescription of Louisiana affects it validity. For we believe it to be a principle everywhere acknowledged, that the discharge of a contract, obtained by prescription or otherwise, in the country where the debt was contracted, extinguishes it everywhere. [Burge's Comm, on Colonel and For. Law, Vol. 3 876, 877, and the authorities there cited—Marcadé, Prescription, Art.

2219, p. 96, Troplong Ib. No. 35, Duranton, Vol. 21 p. 113].

The plaintiffs, in error in addition to the proceeding reasons and authorities, rely on their bills of exception found at pages 69, 70 of the Record.

(Sgd) E. Cushing

Jno. E. Schmidt

Supreme Court of the United States.

FASNACHT *et al.*,
PLAINTIFFS IN ERROR,
vs.
WESTERFIELD *et al.*,
DEFENDANTS IN ERROR.

No. 310.

BRIEF OF COUNSEL FOR DEFENDANTS IN ERROR.

The action in the court below, Louisiana circuit, was instituted January 7, 1868, to recover the sum of $2,833.33, with interest, being the amount of two promissory notes drawn by plaintiffs in error, to their own order, and by them endorsed in blank.

* See petition, Rec., pp. 1 and 2.
** Notes " pp. 2 and 3.

Before this action was commenced the agent of the defendants in error, one T. H. Murphy, who held the notes for collection merely, had instituted suit in his own name against the plaintiffs in error in a State court of Louisiana, the sixth district court of New Orleans, on the 9th February, 1864.

See Rec., p. 10 *et seq.*

Which suit was discontinued.
See Rec., p. 40.

So, to the action in the U. S. court below, the plaintiffs in error excepted that Murphy was the owner of the notes, and, as a citizen of Louisiana, could not sue in the circuit court; and that his suit in the State court was still pending.

See Rec., p. 9.

These exceptions were overruled.
See Rec., p 43.

The plaintiffs in error then filed an answer. They admit their signature to the notes sued on, but aver again that Murphy, and not defendants in error, was the owner of the note, and that he, Murphy, was a citizen of Louisiana. They also urged the Louisiana statute of limitation of five years.

See Rec., pp. 43 and 44.

The case was tried without a jury, and the court below gave judgment for the amount claimed by defendants in error on the 18th May, 1868.

See Rec., p. 65.

An attempt was made by plaintiffs in error to obtain a new trial.

See Rec., pp. 65 and 66.

Which failed.

See Rec., p. 66.

The judgment was signed on the 9th June, 1868.

See Rec., p. 67.

The plaintiffs in error then obtained a writ of error, and lodged the same in the clerk's office on the 15th June, 1868.

See Rec., p. 71.

POINTS.

1. The record contains two instruments in the shape of bills of exception; one, (see Rec., p. 69,) to the rulings of the court on the trial admitting the testimony of Thomas H. Murphy; the other, (see Rec., p. 70,) to the ruling of the court on the trial admitting the depositions of the plaintiffs below, the defendants in error here.

These bills of exception were not filed until the 30th November, 1868, more than five months after the writ of error was lodged in the clerk's office. They do not show that the rulings of the court were excepted to, and the points reserved at the trial; they only show that the admission of

the depositions was then objected to, which is not in law sufficient.

See Section 4, act of March 3, 1865, 13 Statutes at Large, p. 501.
See Walton *vs.* United States, 9 Wheaton, 657.
See *ex parte* Martha Bradstreet, 4 Peters, 107.
See Brown *vs.* Clarke, 4 Howard, 4.
See United States *vs.* Breitling, 20 Howard, 254.

2. But if their bills of exception should be deemed sufficient to bring up for review the rulings of the lower court complained of, then they must be held as unavailing, being found against the admission of testimony in a case tried without a jury.

See Field *et al. vs.* United States, 9 Peters, 201.
See Arthurs *vs.* Hart, 17 Howard, 12.

3. In that part of the second bill of exceptions which objects to the striking out of the endorsements, there is no force; the notes were payable to the order of Fasnacht, and endorsed by him to the defendants in error, the plaintiffs below; and it was immaterial whether the endorsements were or were not on the notes.

4. The notes are not barred by the statute of limitation of five years in Louisiana. They fell due 17—20th March, 1862. The courts of the United States were closed in Louisiana from 26th January, 1861—date of secession—until the end of June, 1863, two years and four months, during which time plaintiffs in error could not be served with process; this being added to the term of prescription prolong it to July, 1869, and the suit was instituted below and process served on plaintiffs in error on 10th January, 1868.

See Rec., pp. 7, 8, and 9.
See act of June 11, 1864, 13 Stat. at Large, p. 123.
See Hanger *vs.* Abbott, 6 Wallace, 532.

Respectfully submitted.

THOMAS J. DURANT.
For Defendants in Error.